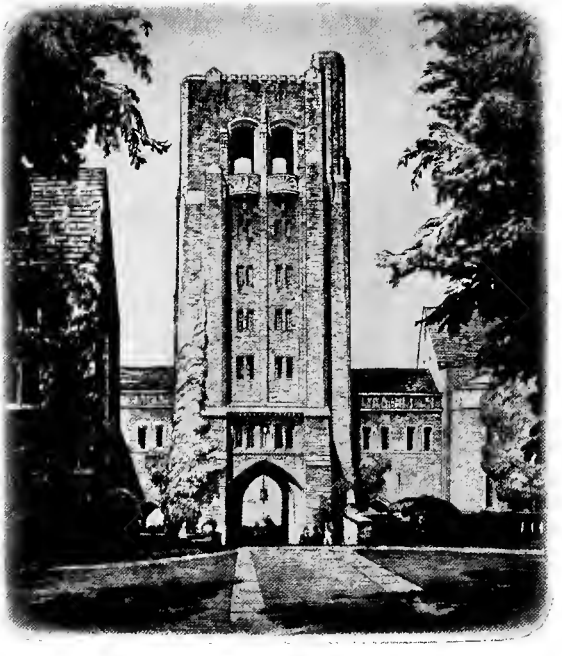

Proceedings of the Bench and Bar

of the

Supreme Court of United States

in memoriam

MATTHEW H. CARPENTER.

WASHINGTON:
Joseph L. Pearson, Printer.
1881.

PROCEEDINGS OF THE BENCH AND BAR

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PROCEEDINGS.

THE BAR OF THE SUPREME COURT OF THE UNITED STATES met in the Court-room, in the Capitol, Washington, on Monday, March 7, 1881, at 2 o'clock P. M., to pay respect to the memory of the late MATTHEW H. CARPENTER.

On motion, Mr. ALLEN G. THURMAN was appointed Chairman, and Mr. JAMES H. MCKENNEY, Secretary.

Mr. THURMAN, on taking the chair, addressed the meeting as follows:

GENTLEMEN OF THE BAR: We have met together to pay a fitting tribute to the memory of our deceased brother, MATTHEW H. CARPENTER.

It might seem to be almost superfluous to say to this audience, who he was and what he was. There is, perhaps, no one here to-day who has not witnessed some one or more of those remarkable displays of forensic eloquence and of legal learning for which he was so justly distinguished. There are but few, if any, lawyers in the Republic who have not heard of his fame; for it was as widespread as the continent. And yet it is but proper and be-

coming that we, who knew him so well and had the best means of observation and judgment, should give expression to the estimate we formed of the lawyer and the man, and suitable utterance to the sorrow we feel at the loss of a friend.

I am well aware of the proneness to extravagance that has too often characterized eulogies of the dead, whether delivered from the pulpit, in the forum, or in the Senate-House. But I feel a strong conviction that, however exalted may be the praise spoken here to-day, it will not transcend the merits of its object, or offend the taste of the most scrupulous and truth-loving critic.

I knew Mr. CARPENTER intimately, from the time we entered the Senate together until his death; a period of nearly twelve years. During two-thirds of this time we served on the Committee on the Judiciary, and I cannot better convey, in brief terms, the impression he made upon me, and upon all his fellow-members, than by reading the following resolution of the Committee, adopted at its last session:

"*Resolved*, That the members of this Committee are deeply affected by the loss of their late colleague, MATTHEW H. CARPENTER, who departed this life, in this city, on the 24th ultimo.

"During a period of nearly eight years' service on this Committee, his great intellectual ability, profound legal learning, and remarkable industry, commanded the admiration of all who served with him, while his uniformly courteous, kind, and agreeable manners won and retained their affection."

Gentlemen, it is not my purpose, nor would it be consistent with the brevity that it is incumbent on me to observe, to give a biographical sketch of our departed friend. There are others here much more competent to perform that duty than I am. I confine myself to the qualities of the lawyer and the man. That he possessed by nature a mind singularly acute, ready, and logical, all who knew him will testify. That these qualities were greatly improved and strengthened by exercise and study, is also well known. But there was another trait of his character that was not so

well known. Although not deficient in a proper self-reliance, he was seldom, it seemed to me, fully satisfied with his own conclusions until he found them fortified by careful and laborious study. It was not sufficient for him to know what he, himself, at first sight, thought of a question; he wanted to know what others had thought of it. And this habit led him to entertain something like a scornful dislike to what are known as "off-hand opinions." He was very far indeed from being a mere case lawyer, but he was also very far from undervaluing the learning that is found in the books. In this respect he was another illustration of the truth, that has perhaps no exception, that no genius, however great, no eloquence, however grand or persuasive, can, without laborious study, make a perfect lawyer.

Of Mr. CARPENTER in his personal relations, it would be a grateful duty for me to speak, for, as I have said, we were intimate friends almost from the time of our first acquaintance. How genial he was, how cheerful even when suffering from disease, how mindful of the feelings of others, how honorable in all his transactions;—these were characteristics that no friend of his will ever forget. And what a wonderful command of temper he possessed. I have seen him in the most heated discussions in the Senate, in committee and at the Bar, when the coolest and most experienced man might have been excused for an angry word, or, at least, an angry look, and yet I cannot recall a single instance in which he lost his temper. Had this self-command been the result of a cold temperament, a want of proper sensibility, or an unfeeling heart, it would afford no theme for commendation. But when it was found in a man of an adent nature, of the keenest sensibility, and of the warmest affections, too much can scarcely be said in its praise. Gentlemen, were I to give way to my inclination, I should say much more. But I would not willingly consume the time that belongs to others, and I forbear.

On motion of Mr. DAVID DAVIS, the following gentlemen were appointed by the Chair to constitute a Committee on Resolutions:

Mr. DAVID DAVIS,
Mr. ARTHUR MACARTHUR,
Mr. ROSCOE CONKLING,
Mr. JEREMIAH S. BLACK,
Mr. R. T. MERRICK,
Mr. PHILIP PHILLIPS,
Mr. CHARLES DEVENS,
Mr. W. D. DAVIDGE,
Mr. JEREMIAH M. WILSON.

The Committee thereupon retired, and on returning reported, through Mr. DAVIS, the following resolutions for adoption:

RESOLUTIONS.

Resolved. That the members of the Bar of the Supreme Court of the United States have received with profound sorrow the intelligence of the death of MATTHEW HALE CARPENTER, who for many years was a most distinguished practitioner in this Court.

Resolved, That we lament the loss of one whose brilliancy as an advocate and learning as a lawyer had elevated him to the highest rank of the profession.

Resolved, That his memory is entitled to be cherished by the Bar for his genial qualities as an associate, for his professional honor and ability, and for his wisdom and independence as a legislator.

Resolved, That the Attorney-General be requested to present these resolutions to the Court; and—

Resolved, That the Chairman of this meeting present these proceedings to the family of the deceased, with the expression of the profound sympathy of the Bar.

THE CHAIRMAN.—The resolutions reported by the Committee are before the meeting.

REMARKS OF MR. ARTHUR MACARTHUR.

Mr. CHAIRMAN: I have been requested to move the adoption of the resolutions just reported by your Committee, and although I can scarcely trust myself with this office, I feel that no apology is necessary for the effort. When I recall our early intimacy and association, commencing before he had established a great reputation at the Bar, or attained one of the highest positions in the Senate, I can scarcely realize that he accomplished this in a little more than a score of years, and that now there is nothing of him left but the sacred image of the dead.

MATTHEW HALE CARPENTER died in the flower of his years and the zenith of his fame, and the wonderful possibilities which were in prospect from the exercise of his great faculties have been prevented when most certain and most needed. His death is, therefore, felt as a public and professional loss. It is a touching spectacle we witness in this distinguished gathering, for although he had attained high position at the Bar and in the Senate such as few lawyers possess, there was no envy, no jealousy, in the feelings of his contemporaries, and here to-day, by a spontaneous emotion, are assembled distinguished members of the Senate and the most eminent representatives of the Bar, to pronounce his panegyric and to pay respect to his fame by imposing and honorable remembrance of his life.

Mr. CARPENTER commenced his legal studies in the office of Governor Dillingham, at that time the leading lawyer in the State of Vermont, and who subsequently became his father-in-law. In the space of a year he removed to Boston and became the pupil of Rufus Choate, then in the full splendor of his professional career. That great advocate was not slow to appreciate the remarkable dili-

gence and powers of his student, and predicted his future success. Upon being admitted to the Bar he immediately went West, in 1848, settling at Beloit, then the centre of one of the most important counties in the State of Wisconsin. It may be safely affirmed that CARPENTER had every qualification for the toilsome ascent before him, and the heroic endurance necessary to acquire professional success. He soon took position among the first at the Bar. Business prospered, and he became the leader in the circuit, like one to whom the place belonged.

He must have been in his thirty-second year when he argued his first celebrated case in the Supreme Court of the State. It related to the disputed title to the office of governor, and enlisted the ablest and oldest lawyers on either side. During the previous six years Mr. CARPENTER had frequently addressed the Court, making a strong impression by the clearness of his statements and the excellence of his briefs, and commanding not only the attention but the respect and confidence of the judges; but now he displayed that wonderful power of expression and argument which has since distinguished him before the whole country.

In 1856 he became a resident of the city of Milwaukee and was at once retained in a great railroad litigation involving corporate rights and franchises, a subject which still agitates public opinion, and will probably convulse the forum of public policy more in the future than in the past. When he appeared in the Supreme Court of the United States, where these cases were finally determined, those who heard and the judges who listened were struck not less by his manner than by his argument. He took his place among the able lawyers of the country.

In 1861 the country was startled by the fall of Sumpter and the Proclamation of the President. There are certain public questions which take shelter under the protection of party politics and are dovetailed into their accepted platforms; but here was a question forbidden to that cate-

gory, and every citizen was to decide the question of country and patriotism for himself. Mr. CARPENTER felt himself compelled to sever the political bonds of his party and to give all his talents, his voice, and his acts to the active prosecution of the war and the support of the Government.

In 1868 Mr. Stanton, who was then Secretary of War, employed Mr. CARPENTER to represent the United States in the Supreme Court in the celebrated case of McArdle. Perhaps no greater constitutional questions were ever presented for the consideration of that tribunal. His brief on this occasion is often referred to as one of the masterpieces in our forensic literature; and it is remarkable that the positions argued by him constituted the very grounds upon which the reconstruction measures enacted by Congress were founded, and the States related back to their place in the federal Union. It is not often that a mere lawyer has the good fortune to mold and reinstate the jurisprudence of his country. It is only when genius has a rare opportunity like Erskine, when he vindicated and saved freedom of speech in the Stockdale trials for the benefit of all English-speaking people; or Hamilton, when in a single effort he re-established the true doctrine of libel; or CARPENTER, when he enforced the principles upon which the national Union must ever repose for its safety. He was now placed before the whole people as a great constitutional lawyer. This important event in his life was soon followed by his elevation to the Senate. And although it is only in his capacity as a lawyer that we speak of him here, I may be permitted to say that the expectations of his friends and constituents were amply justified. His reputation is not more established at the Bar than his success in that great assembly. It was the first and only office he ever held, except that of prosecuting attorney for the county where he first settled in Wisconsin.

In regard to the personal character of the deceased I can only speak from my affections. My sentiment is one

of devotion to his memory, and my inspiration is the friendship now hallowed by his death. During his residence in the city of Washington, those in suffering and distress constantly applied to him and received such relief as his generous nature prompted him always to extend. He was courteous and gracious to all, and ingratiated himself with the ignorant, the unfortunate, and the oppressed, for he knew how useful information could be obtained from those engaged in other pursuits, even the humblest and the most obscure. He was amiable and patient to the very last limit of endurance; and, while he had few favors to remember, and the exercise of gratitude was not often called for on his part, there are hundreds, and even thousands, who will recall his kindness in word and act, and express their gratitude all the days of their lives.

There was no malice in his nature, and he forgave an injury with the readiness that he conferred a favor, and, in either case, he seemed better and happier.

He had not received a classical education and spoke no language but his own, but his knowledge of English literature was extensive, accurate, and scholarly, and he had accumulated the most extensive private library in the Northwest.

The great duty of the advocate is self-devotion, to advance the interest of his client rather than his own fame or wealth, and CARPENTER regarded this as the very tenure of his professional existence. In that cause so sacred in his consciousness, he would face a court and defy popular clamor, and he would talk all day and labor all night when the fortunes of a great controversy were in his hands, even when the fee or reward was uncertain.

His prodigious power of labor and application, before his health gave way, if not genius itself, was one of his most remarkable characteristics. After spending a day or evening in ordinary pursuits, or social enjoyment, he not unfrequently employed the night in preparing for the morrow, when he would appear in Court fresh and un-

daunted as after a night's repose, and woe to the adversary who thought to gain an advantage or secure a surprise. When he went to a trial he knew every point in the case, and just where to press his argument. He was skilled in every branch of practice at *nisi prius*. To interrogate a witness, address the Court, or seize with dexterous ingenuity every law-point that came to hand, seemed to be a natural instinct with him. He filled the ear of the jury with the wondrous tone of his voice, and kept them from the weariness of a long trial by his overflowing humor and bonhommie. He knew the spirit of the people and was acquainted with all the terms of their sensational expression. He was always wide awake, thoroughly in earnest, and his quickness at repartee made it dangerous for his antagonist to risk any personal or critical allusion. His temper was perfect, to which was allied his extraordinary power of speaking directly and clearly to the point in hand like all great *nisi prius* lawyers in the open exercise of their profession. Although he seldom indulged in figures of speech or flights of the imagination, no one could clothe a logical argument in clearer terms or with more powerful appeals. At times his eloquence could persuade and not unfrequently he inspired a jury by the magnanimity of his sentiments. It was a common observation that he never left the least ground of complaint either to his client or his adversary.

His sparkling conversation, his ready wit and genial appreciation, rendered him the most charming and agreeable of companions. He never was formally connected with any religious communion, but he bad a reverent belief in the principles of Christianity, remembering that the great Law-Giver is the creator and father of us all.

To consecrate the ashes of the dead, and to remember and practice what was good and generous in their lives, is the most acceptable service we can render to those who have been separated from the living and become partakers of a diviner life. Let this be the tribute we pay to the

memory of our departed friend, whom death has translated to immortality.

Mr. Chairman, I close by moving the adoption of the resolutions.

Remarks of Mr. J. S. Black.

The American Bar has not often suffered so great a misfortune as the death of Mr. Carpenter. He was cut off when he was rising as rapidly as at any previous period. In the noontide of his labors the night came, wherein no man can work. To what height his career might have reached if he had lived and kept his health another score of years, can now be only a speculative question. But when we think of his great wisdom and his wonderful skill in the forensic use of it, together with his other qualities of mind and heart, we cannot doubt that in his left hand would have been uncounted riches and abundant honor, if only length of days had been given to his right. As it was, he distanced his contemporaries and became the peer of the greatest among those who had started long before him.

The intellectual character of no professional man is harder to analyze than his. He was gifted with an eloquence *sui generis*. It consisted of free and fearless thought wreaked upon expression powerful and perfect. It was not fine rhetoric, for he seldom resorted to poetic illustration; nor did he make a parade of clenching his facts. He often warmed with feeling, but no bursts of passion deformed the symmetry of his argument. The flow of his speech was steady and strong as the current of a great river. Every sentence was perfect; every word was fitly spoken; each apple of gold was set in its picture of silver. This singular faculty of saying everything just as it ought to be said was not displayed only in the Senate and in the Courts; everywhere, in public and private, on his legs, in his chair, and even lying on his bed, he always "talked like a book."

I have sometimes wondered how he got this curious felicity of diction. He knew no language but his mother-tongue. The Latin and Greek which he learned in boyhood faded entirely out of his memory before he became a full-grown man. At West Point he was taught French and spoke it fluently; in a few years afterwards he forgot every word of it. But perhaps it was not lost; a language, (or any kind of literature,) though forgotten, enriches the mind as a crop of clover ploughed down fertilizes the soil.

His youth and early manhood was full of the severest trials. After leaving the Military Academy he studied law in Vermont, and was admitted, but conscientiously refused to practice without further preparation. He went to Boston, where he was most generously taken into the office of Mr. Choate. He soon won not only the good opinion of that very great man, but his unqualified admiration and unbounded confidence. With the beneficence of an elder brother, Choate paid his way through the years of his toilsome study, and afterwards supplied him with the means of starting in the West. The bright prospect which opened before him in Wisconsin was suddenly overshadowed by an appalling calamity. His eyes gave way, and trusting to the treatment of a quack, his sight was wholly extinguished. For three years he was stone-blind, "the world by one sense quite shut out." Totally disabled and compassed round with impenetrable darkness, he lost everything except his courage, his hope, and the never-failing friendship of his illustrious preceptor. Supported by these he was taken to an infirmary at New York, where, after a long time, his vision was restored. Subsequent to these events, and still under the auspices of Mr. Choate, he returned to Wisconsin and fairly began his professional life.

It would be interesting to know what effect upon his mental character was produced by his blindness. I believe it elevated, refined, and strengthened all his faculties. Before that time much reading had made him a very full man; when reading became impossible reflection digested

his knowledge into practical wisdom. He perfectly arranged his store-house of facts and cases, and pondered intently upon the first principles of jurisprudence. Thinking with all his might, and always thinking in English, he forgot his French, and acquired that surprising vigor and accuracy of English expression which compel us to admit that if he was not a classical scholar, he was himself a classic of most original type.

He was not merely a brilliant advocate, learned in the law, and deeply skilled in its dialectics; in the less showy walks of the profession he was uncommonly powerful. Whether drudging at the business of his office as a common-law attorney and equity pleader, or shining as leader in a great nisi prius cause, he was equally admirable, ever ready and perfectly suited to the place he was filling. This capacity for work of all kinds was the remarkable part of his character. With his hands full of a most multifarious practice he met political duties of great magnitude. As a Senator and party leader he had burdens and responsibilities under which, without more, a strong man might have sunk. But this man's shoulders seemed to feel no weight that was even inconvenient. If Lord Brougham did half as much labor in quantity and variety, he deserved all the admiration he won for versatility and patience.

Mr. CARPENTER'S notions of professional ethics were pure and high toned. He never acted upon motives of lucre or malice. He would take what might be called a bad case, because he thought that every man should have a fair trial; but he would use no falsehood to gain it; he was true to the Court as well as to the client. He was the least mercenary of all lawyers; a large proportion of his business was done for nothing.

Outside of his family he seldom spoke of his religious opinions. He was not accustomed to give in his experience—never at all to me. He firmly believed in the morality of the New Testament, and in no other system. If you ask whether he practiced it perfectly, I ask in re-

turn; Who has? Certainly not you or I. He was a gentle censor of our faults; let us not be rigid with his. One thing is certain, his faith in his own future was strong enough to meet death as calmly as he would expect the visit of a friend. Upwards of a year since his physicians told him that he would certainly die in a few months; and he knew they were right; but with that inevitable doom coming visibly nearer every day, he went about his business with a spirit as cheerful as if he had a long lease of life before him.

I think for certain reasons that my personal loss is greater than the rest of you have suffered. But that is a "fee grief due to my particular breast." It is enough to say for myself, that I did love the man in his life time, and do honor his memory, now that he is dead.

Remarks of Mr. A. H. Garland.

Mr. Chairman: This is not an ordinary occasion and it excites in all of us no ordinary feelings, for we have met here to pay the last honor to one of the remarkable men of this remarkable age, and this remarkable country. My acquaintance with Mr. Carpenter began in this chamber in December, 1865, under circumstances that make it proper that I should offer some tribute to his memory; though feeble, it is sincere and heartfelt.

During the previous month I had filed in the Supreme Court of the United States a petition to be admitted to practice in the Court, without taking the oath which had been prescribed by the Act of Congress of 1862, known as "the lawyers' test-oath." Mr. Reverdy Johnson had generously volunteered his services in the case to me, and my old and esteemed friend, Mr. Middleton, whose name I cannot mention without emotion, then clerk of that Court, recommended me to employ, also, Mr. Carpenter.

The next day, some few moments previous to the assembling of the Court, through Mr. Middleton, I was made acquainted with Mr. Carpenter. Making known to him

the special object of my introduction to him, he replied with that frankness and quickness which always characterized him, that he had seen and examined the petition as published in the newspapers, that he agreed with the conclusions of the petition, and thought its prayer should be granted; but that neither I nor my friends had money enough to employ him, though if I would accept his services he would render them cheerfully.

Mr. CARPENTER appeared in the case, made a clear, bright, and cogent presentation of it, standing at about the very point in this room where the friend who first spoke of him to day stood. He made such an argument as added much to his already growing fame in that forum and put him forthwith among the leaders of this Bar, which position we all know he occupied till the time of his death. From that time until the sad occurrence we now mourn, our acquaintance was and continued to be a warm and sincere friendship.

Often in the troublous times through which the State where I live passed, did I avail myself of his generous and kind counsel and wise advice, which he never withheld and which he never gave grudgingly. To me and to the people of Arkansas, he was a friend indeed, and in need, and with me and with them his memory will ever live and grow brighter as it lives.

It is not for me to speak of Mr. CARPENTER'S public services and life. They are written in the records of the highest tribunals of the land; they are entered in the journals of the Senate of the United States; they are imprinted in the hearts of the people, and they are the property of the country. His life was another splendid example to the young men of the nation, full of cheerful lessons and stimulants to their aspirations and their hopes. Coming from the very foundation of society, without any family record, without any previous heraldry, with no ancestral *prestige*, he worked his way up to become admired in the nation amongst its legists, publicists, and statesmen.

Always genial, kind, and generous, even during the two past years when you, Mr. Chairman, and others of us here who served with him in the Senate Committee on the Judiary knew, and when he himself knew, that death had already thrown its shadow across his path, he labored on and he labored in genuine good humor, not morosely. If in the course of his life he had to send forth arrows, like the Tartars his name was upon them that the arm that shot them might be known, but they were not dipped in poison, they were not dipped in malice.

It is said that in the final analysis of all things nothing remains but character. In this instance what a rich and precious legacy this is to his family and his country! And as this life is but a trust to be executed and accounted for, those here who know how well he performed his trust will hope that the account of it which he is ready to render may secure him a home in another life of brightness and of beauty, where he may dwell in one of those many mansions that are in Our Father's house.

Mr. Chairman, I have not had time, and from indisposition I have not been able, to prepare my thoughts as I should like to have delivered them; but at another time and in another place I will take an opportunity to pay, as far as I am able, a fitting tribute to one whom I loved in his life-time, and whose memory I now cherish in the language of the resolutions, which I heartily second.

Remarks of Mr. J. M. Wilson.

Mr. Chairman: On the 18th of February, 1876, the members of the Bar of the Supreme Court met in this room to pay respect to the memory of Reverdy Johnson, and he whose death we have to-day met to deplore, Matthew Hale Carpenter, presided as chairman of that meeting.

In his address on taking the chair, in speaking of the qualities of Reverdy Johnson as a lawyer, he unconsciously

described himself in these words, which I will read from the report of that meeting:

"And considering the extent and variety of his prac-
'tice; his natural resources and professional attainments;
'his thorough self-possession and steadyness of nerve,
'when the skill of an opponent unexpectedly brought on
'the crisis of a great trial,—an opportunity for feeble men
'to lose first themselves and then their cause; his fidelity
'to the oath which was anciently administered to all the
'lawyers of England,—to present nothing false, but to
'make war for their clients; the audacity of his valor when
'the fate of his client was trembling in the balance,—he
'believing his client to be right, while every one else be-
'lieved him to be wrong;—remembering all these traits,
'we must rank him with the greatest lawyers of this or
'any other country."

A little further on he gave another description, which I beg to read:

"His outward form proclaimed the man. His compact,
'firm-knit frame, his heavy shoulders, his round head, his
'striking face, bearing the furrows of many sharp profes-
'sional and political conflicts, but from which there still
'shone his gentle, kindly nature,—all indicated a man of
'genial nature, yet resolute of purpose,—a man easy to
'court, but dangerous in conflict."

Excepting that time had plowed no "furrows," how strikingly accurate a description, in many respects, are these utterances, of him who uttered them, as he was a few months ago, before disease had made him its prey. He possessed qualities of mind that are rarely combined in one man.

He was humorous, witty, quick in repartee, brilliant as an orator, a rapid and accurate thinker, a strong reasoner.

While he was endowed with brilliancy and genius, he did not rely upon these; he was a hard worker. His range of information was wide; he was conversant with legal

precedents; he was thoroughly schooled in the fundamental principles of the law.

These powers and acquirements were always at his command, ready for use in the most unexpected emergencies of offensive or defensive conflict.

No man whom I have ever known could see more quickly the strong or weak point in a cause.

His was a genial and kindly nature.

He was full of sympathy, he was generous to a fault, he intensely hated a wrong, and the humbler the object of the wrong the more intensely he hated it.

He is dead. To use his own language, as applied to Mr. Johnson, "he has passed from the known to the unknown; from Earth to the hereafter of hope and faith," but his rare qualities of mind and heart will remain as pleasant memories to those who knew him well.

Remarks of Mr. James H. Embry.

Mr. Chairman: It was my privilege to know well, though not intimately, during recent years, him whose loss we mourn to-day. Soliciting his professional aid in matters entrusted to my care, I had the opportunity of witnessing the strength and vigor of his mind, the grasp of his intellectual power, the fertility of his resources, and the splendor of his genius.

Every constitutional and legal question presented to him was penetrated and probed from circumference to centre, until he touched and grasped and mastered the great leading idea or principle around which all others revolved.

His strong, compact, forcible arguments, enriched by his learning, adorned by his illustrations, and touched by his wit, made him ever a welcome advocate before the Courts, which he never failed to enlighten and instruct. Fortunate was his antagonist, when Mr. Carpenter sum-

moned his full strength and energies and poured the full fire of his artillery against the apparently impregnable fort behind which that antagonist was concealed, if he failed to dislodge him.

In his professional and public life he consecrated himself wholly to the great work before him. He bowed before the altar of duty, lighted by the torches of resolution and fidelity, and made his physical strength a martyr to his intellectual energies. He cherished a sacred reverence for the Constitution of his country, and as an American Senator he guarded it, with sleepless vigilance, as the only pure fountain, whose living streams refresh, invigorate, and sustain the national life. In law he was an artist, like Michael Angelo, in virgin marble, " who, fashioning the daintiest forms of beauty, handled his chisel and his mallet as if he were hewing a pyramid."

Mr. Chairman, it is only here and there, at long intervals, amid the epochs of national life, that time, as it plants its century monuments, points with pride and exultation to the man, who, equally and alike, in the halls of legislation, at the bar and upon the hustings, leaves the enduring and indelible impress of his power and his greatness upon the generation with which he lived. And the historian who shall write the record of these times will not fail to accord Mr. CARPENTER an eminent and conspicuous place among the nation's foremost statesmen, lawyers, and orators.

Just five years ago, on the 18th of last month, Mr. CARPENTER presided in this chamber, at a meeting of the members of this Bar, to pay respect to the memory of one who was the recognized leader of the American Bar, the late Reverdy Johnson. He paid a beautiful tribute to the abilities and services of Mr. Johnson, and the following utterance fitly applies to himself: " Nature sets indelible marks upon the productions of which she is proudest. His outward form proclaimed the man. His compact, firm-knit

frame, his heavy shoulders, his round head, his striking face, bearing the furrows of many sharp professional and political conflicts, but from which there still shone his gentle, kindly nature,—all indicated a man of genial nature, yet resolute of purpose,—a man easy to court, but dangerous in conflict."

And here, too, Mr. Chairman, he left behind him the record of his trust and faith in the justice of God, as firm and unshaken as that of St. Paul or Martin Luther. Speaking of Mr. Johnson's sudden death, he said: "Without pain, without death-bed parting from those he loved, (more painful than death itself,) possessing all his faculties in full vigor, rich in honors and glorious with praise, he passed in an instant from the known to the unknown, from Earth to the hereafter of hope and faith. And if it was ordered that the scene of his mortal life must end that moment, who can say that the manner of its close was not also ordered, *in mercy*, by that God *who doeth* ALL *things well?*"

But above and beyond all these high qualities, these mental endowments and acquirements, Mr. CARPENTER, in that higher sphere of life, as man and citizen, was pre-eminent. I sincerely believe, Sir, that he was an honest man, in the highest and truest meaning of those words. I sincerely believe, Sir, that, in all his intercourse with his fellow-men, he purposely wronged no man, but that he walked ever by the light of the Golden Rule.

Mr. Chairman, when his remains shall be borne from this District, the theatre of his sternest struggles and his proudest triumphs,—borne in the Nation's keeping by loving hands and loyal hearts, to his distant home in the city by the Lake,—Wisconsin will hold within all her wide borders the ashes of no child who has labored more faithfully for her interests, or added more of honor and renown to her own high name.

May all the dwellers within her borders to-day, and succeeding generations, keep lighted around the spot

where he shall sleep the vigils of their affection and their love, with the same constancy and fidelity with which he gave the best years of a noble manhood to her service, falling at last, like a mailed warrior, by her side, "rich in honors and glorious with praise."

The resolutions were agreed to unanimously; and thereupon, on motion of Mr. CONKLING, the meeting adjourned.

Supreme Court of the United States.

FRIDAY, MARCH 11TH, 1881.

Present:

The Honorable MORRISON R. WAITE, *Chief Justice;*

SAMUEL F. MILLER,

STEPHEN J. FIELD,

JOSEPH P. BRADLEY,

JOHN M. HARLAN,

WILLIAM B. WOODS,

Associate Justices.

Mr. Attorney-General MACVEAGH presented the resolutions of the Bar on the death of Hon. M. H. CARPENTER, which were read and ordered to be filed.

ADDENDA.

We subjoin the address of Judge MacArthur before the Wisconsin Association at Washington, as it is the only account which has been given by an eye-witness of the last moments of Senator CARPENTER. Judge MacArthur reported a series of resolutions, and spoke as follows:

MR. CHAIRMAN: The resolutions have been prepared in brief terms to express the profound sorrow and deep sympathy which must move the bosom of every citizen of Wisconsin on the death of Senator CARPENTER. They were expressed in brief terms, as his life-work was his best eulogy, and his brilliant career his only fitting panegyric. His services were bequeathed to the country, and his memory will be cherished as long as patriotism prevails and statesmanship is honored.

The death of a great man is nearly always sudden, unexpected, and appalling. He lives so much in the public eye, and is interwoven so much with the public life, that what belongs to the individual is overlooked in the common interest and admiration, and when his death occurs it comes upon us like a tropical sunset,—sudden, instantaneous, involving us in darkness and despair. This was in some measure true in regard to the demise of Senator CARPENTER. Those who were intimate with him had for many months observed a marked change in his appearance; his magnificent person was losing its fullness of

habit; the lustre of his merry eye, the cadence of his ringing laugh, were impaired and overcast with the coming shadow. Fits of indisposition were alternated with periods of apparently returning health, and hope and friendship recovered confidence and abandoned all fears for his safety.

On the afternoon of Wednesday last I visited at his residence and stood by his bedside, where he was then asleep. I saw a dreadful change had happened; the end was written upon his face, and then for the first time I gave up all hope. Upon calling later in the evening, I found his respiration painful and laborious, and it seemed as if his life were struggling to retain its dominion in every breath. A torpor had seized upon his consciousness, but his attention could be roused to particular persons or objects. Placing my hand upon his shoulders, and gently shaking him, I asked him if he knew me. After a second he replied, "It is the Judge;" and after another short pause, he added, "Mrs. Carpenter and I have been talking of coming over to see you;" and then, as if his old spirit of humor and merriment had returned, he said, "Judge, I want to make a motion;" to which I replied, that his motion was granted without argument.

An hour or two after midnight I was again by his bedside. He was still weaker than before, and the vital forces were yielding slowly but surely to the impending catastrophe. The last indication of consciousness occurred shortly before day-break, when he slowly turned his head toward Mrs. Carpenter and his daughter. It was his last effort at recognition, and he then closed his eyes, never again to behold his beloved ones on earth. At this time there were present his wife, his daughter and son. Dr. Fox, who had travelled night and day from Milwaukee, and who supplemented science with friendship and love, was also present, as was the Hon. Chas. G. Williams. As the members of his own family sat by the death-bed of him they loved so dearly, it seemed to me the most beau-

tiful, the most sad and touching tableau I had ever witnessed. At length daylight broke through the crevices of the curtains, the sun came forth in unclouded splendor, and the atmosphere was balmy as in the early days of Spring. It was full of the elixir of life, but brought no relief to our friend. Leading Mrs. Carpenter to the window, I asked her if she could remember the dying expressions of the great Mirabeau, whom her husband so much resembled in his powers of persuasion. "Open the windows," he exclaimed. "Throw aside the curtains and let the sunshine fill the apartment, and bathe me in its beams, and let the incense of the garden reach my senses, for I would die amidst the perfume of its flowers." But how different is this scene in one respect, for the great Frenchman, though he feared not death, believed it to be an eternal sleep. But your gifted husband, although so largely absorbed in the activities of life, and although taking such large share in public business, had a strong and fruitful religious vein in his nature, and believed that death, instead of being our final destiny, was but the entrance to a higher and truer life.

At about nine o'clock Dr. Fox called me suddenly to the bedside. The breathing had almost ceased, the quick respiration had entirely gone, the breath came at long intervals, and the attendant clergyman began reading the solemn service of the Church for the dying. The physician kept his hand upon the heart to mark the ebbing tide of life; I looked at the doctor after each spasm, and the reply was, "Not yet." At last came a pause, long and endless; the physician withdrew his hand, and CARPENTER was dead.

I give these particulars that you might have them from an eye-witness, and may be able to appreciate the last moments of one who was your friend and our friend. Indeed, I do not know of a human being who ever knew Senator CARPENTER that will not feel that they have lost a friend and almost a member of their own household.

It is not my purpose to dwell at present upon what constituted the mental power and greatness of this remarkable man. It has been my good fortune to have known, on terms of personal intimacy, many of the men who have become historical in our country. Among them Rufus Choate, Daniel Webster, Judge Curtis, and many others of the same generation and almost equal in reputation. Without entering upon the questionable field of personal comparison, I think I am justified in saying that CARPENTER would have been distinguished even among the distinguished. His quickness of perception was amazing, but he had one quality in a higher degree than I have ever observed in any one that I have known, and that was his wonderful power of rallying all his mental faculties and all his acquirements and knowledge instantaneously, upon sudden emergencies, and accomplishing off-hand work that would have required study and reflection in any other man. It was this power which enabled him at once to seize upon the sensitive point of a controversy, and to make that which was complicated and difficult, clear and obvious to the comprehension of those he addressed or wished to persuade. He had another peculiarity, less known to the public, but which constituted one of the greatest elements in his success as a lawyer, and that was his skill in cross-examination of witnesses. Lord Brougham's cross-examination of the Italian witness in the House of Lords, upon the trial of Queen Caroline, has always been regarded as one of the greatest master-pieces in the history of English state trials. But I am quite sure that I have witnessed an instance of the same kind upon the Ottman trial, in this District, for the Treasury robbery, in which for two days Senator CARPENTER conducted the cross-examination of an accomplice used as a witness by the Government. The wonderful fertility of interrogation that was baffled by no evasion, and the patience with which he listened to tedious details and utilized them by dexterous turns of expression and quick and unexpected questions

presented his wonderful skill and resources in a way which I have never seen approached. In two other instances I have known him, by the mere force of probing the conscience and throwing the witnesses off their guard, to trace the crimes of forgery and perjury to the witnesses themselves, in so clear a manner as to end the prosecutions and save his clients.

I need not refer to his brilliant career in the Senate; that much is recorded and history will preserve it. Although engaged as extensively as any of his brother Senators in the debates and discussions of that high assembly, no harshness was mingled with his eloquence, nor has he left the sting of bitter invective to rankle in a single bosom. His generous nature and liberal hand made all who knew him, friends, and all who were intimate with him, lovers.

But, as I have already observed, I do not design to speak of his intellectual qualities or to enlarge upon his professional career. That duty will be performed by others, on an occasion more suited to the subject than the present. We have come together to express our love; we stand by his grave and drop the tear of sensibility; the eloquent lip is sealed in eternal silence. The dull, cold ear of Death vibrates not to our affectionate solicitude. With reverent care and with tears and prayers we resign him to the merciful Father of us all.

So live, that when thy summons comes to
the innumerable caravan that moves
to the pale realm of shade, where each shall
his chamber in the silent halls of death
thou go not, like the quarry-slave at night
scourged to his dungeon, but, sustained and
by an unfaltering trust, approach thy grave
like one who wraps the drapery of his couch
about him, and lies down to pleasant dre

[Reprinted from Harpers' Magazine for October, 1873, by Permission.]

THE JUDICIAL RECORD

OF THE LATE

CHIEF JUSTICE CHASE.

By JOHN S. BENSON,
COUNSELLOR AT LAW.

"To be, and not to seem, is this man's maxim;
His mind reposes on its proper wisdom,
And wants no other praise ——."
ÆSCHYLUS—"*Seven Against Thebes.*"

SECOND EDITION.

NEW YORK:
BAKER, VOORHIS & CO., PUBLISHERS,
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1882.

It has been often suggested that the republication of this paper in a form convenient for general circulation, would afford special gratification to the many friends and admirers of the late Chief Justice, while it could not fail to find a welcome among professional readers in all parts of the country. This pamphlet is the result; and if its pages shall contribute only to the pleasure of those whose wishes have called it forth, the author will feel amply compensated.

Appended will be found the judgment of its merits of the late Hon. Reverdy Johnson, to whose criticism the original manuscript was submitted, together with the opinions formed of it by other eminent jurists after reading the printed article.

The thanks of the author are specially due to the Messrs. Harper & Brothers for their kind permission to reprint.

J. S. B.

247 Broadway,
New York, May 1, 1882.

From the late REVERDY JOHNSON.

BALTIMORE, June 20, 1873.

MY DEAR MR. BENSON:

I return to-day by express (Adams), your paper on the judicial life of Chief Justice Chase. You should have had it before, but that I was not able until to-day to have the whole of it read to me. It is written remarkably well, and does full justice to the Chief. Should you put it in pamphlet form do me the favor to send me a copy. Yours truly,

REVERDY JOHNSON.

From Mr. Justice MILLER, *of the Supreme Court.*

SUPREME COURT OF THE UNITED STATES,
WASHINGTON, March 12, 1882.

MY DEAR BENSON:

I am glad to learn that your article in Harpers', on the Judicial Record of my friend the late Chief Justice Chase, is to be republished in pamphlet form. I read the article in the magazine with much pleasure, and thought it a well considered and sound view of that eminent man as chief justice of our court. I am glad it is to be made accessible to his numerous admirers.

Very truly yours,

SAMUEL F. MILLER.

From Ex-Justice STRONG, *of the Supreme Court.*

WASHINGTON, March 10, 1882.

JOHN S. BENSON, Esq.

DEAR SIR:—I remember having read your article in Harpers' Monthly, on the judicial character of Chief Justice Chase, soon after its publication. I thought it then a discriminating and able presentation of the work of the Chief Justice, of the comprehensiveness of his views, and of the ability with which he enforced them. I thought it also a just exhibit of the fairness with which he addressed himself to the great public questions before the Supreme Court. Very respectfully yours, &c.,

W. STRONG.

From Mr. Justice BRADLEY, *of the Supreme Court.*

SUPREME COURT OF THE UNITED STATES,
WASHINGTON, April 9, 1882.

JOHN S. BENSON, Esq.

DEAR SIR:—Your article in Harpers' Magazine, on the judicial record of Chief Justice Chase, struck me as very appreciative and just. He was certainly an instance of a great mind successfully turning into a new channel of investigation in mature years. Your remarks as to the style of his opinions accord with my own views, which, I think, you will find expressed in the article "Salmon P. Chase," in Johnson's Cyclopedia.

Very truly yours,

JOS. P. BRADLEY.

From Mr. Justice HUNT, *of the Supreme Court.*

WASHINGTON, Dec. 20th, 1873.

DEAR SIR:

I have read your paper in Harpers' Monthly, on the judicial record of Chief Justice Chase, with much interest and instruction. It is a faithful and able presentation of the leading events in his judicial career, and a just illustration of his character. Very truly yours,

WARD HUNT.

JOHN S. BENSON, Esq.

From Chief Justice DAVIS, *of the Supreme Court, New York City.*

SUPREME COURT, Judges' Chambers,
NEW YORK, April 15th, 1882.

MY DEAR MR. BENSON:

I have read your paper in Harpers' Monthly, entitled "The Judicial Record of the late Chief Justice," with pleasure and profit. It is admirably written, and, I think, for the most part, accurate and just.

The proposed republication in a separate and more convenient form, is, in my opinion, very desirable, as in that way you will be able to place in the hands of the profession, and especially of its younger members, a work commendable for its style, brevity and faithfulness, from which all can derive instruction, and the still more valuable benefits that flow from the example of such an able and honest statesman and jurist as Salmon P. Chase.

In haste, I am, truly,

NOAH DAVIS.

J. S. BENSON, Esq.

From Chief Judge NEILSON, *City Court of Brooklyn.*

CHAMBERS.
THE CITY COURT OF BROOKLYN, N. Y.,
BROOKLYN, Feb. 11, 1882.

MY DEAR SIR:

I beg to say that I have read with care—more than once—and with great interest and satisfaction, your paper on Judge Chase, in the magazine.

It is of value to the judicial as well as to personal history, and well worthy of study and preservation. I am glad you had the time as well as the inspiration to write it.

I held the Chief Justice in such reverence and loving remembrance, that, it seems to me, his services and character cannot be too often recalled and illustrated.

With much respect, yours truly,

J. NEILSON.

THE JUDICIAL RECORD

OF THE LATE

CHIEF JUSTICE CHASE.

On the opening of the Supreme Court of the United States, December 7, 1864, in the course of some remarks in reply to resolutions of respect for the memory of the late Chief Justice Taney, read by James M. Carlisle, Esq., a life-long friend, Mr. Justice Wayne, then senior Associate Justice of the Court, thus referred to the deceased in connection with his predecessor: "As his predecessor, our great Marshall, had been, he was made Chief Justice, having but recently held high political office. Both were leaders in support of the administration of which they had been cabinet officers."

Marshall, Taney and Chase.—A Remarkable Fact.

It is remarkable how aptly this language will apply to Chief Justice Chase. The same may be said of him without modification. And the parallel may extend still further as to all of them, and state what at first thought would seem to be an extraordinary fact—that neither of them ever sat upon the bench until elevated to the Chief Justiceship.* But in view of the great distinction which they each gained in that position, notwithstanding their previous lack of judicial service, it may perhaps be regarded as a question of some moment whether, in the selection of persons for high judicial appointment, care should not be taken to choose those who are not only eminent jurists as recognized by the profession, but who unite with that primary qualification those other public experiences and popular acquirements which cannot fail to give additional breadth and scope to judicial decision, and lend the attractions of superior grace and culture to the judicial

* The same is true of Chief Justice Waite, whose opening career has well assured a fourth parallel of eminence.

character. It is true there is a prejudice in the profession—and it is a wholesome one—against placing politicians on the bench.

Who should be Judges.—Mr. Webster's View, and an Opposing One.

Daniel Webster once declared that he would have no one on the bench who was not always and altogether a judge. And there are many lawyers of to-day who concur in this sentiment. But is it the correct view? Would those who entertain it have objected to Webster himself as a candidate for judicial honors? Are there any to dispute that, could he have been prevailed upon to accept the Chief Justiceship, his judicial record would have been more luminous for his vast experience in the forum of constitutional debate and in the administration of public law as Secretary of State? In other words, who will deny that Webster's great mind was more and more expanded from year to year, and his gigantic intellect still daily extended in its proportions and in its power, by the opportunities for contact and contest with other great intellects of the country and of the world afforded him by his Senatorial career and the duties of the Foreign Office? To deny this would be unreason, because a contradiction of the whole theory of mental development as admitted and established by the testimony of every known intelligence. How, then, shall any one say that he who is in all respects a great jurist will not be a greater man, and hence a greater judge, if superadded to his advanced proficiency in the law he be given all those other accomplishments with which the exercise of his abilities in public life will clothe him? Any other rule would lead to the anomalous conclusion that knowledge and experience do not impart wisdom, and, by a parity of reason, to the absurd hypothesis that the more a man knows the less he is qualified for responsible office. Where, then, is the ground for prejudice against a great lawyer as a judge because he has become greater than a great lawyer by acquiring the qualifications of a statesman? But further discussion of this subject would seem idle; and without assigning additional grounds for the belief that increase of knowledge is the exalta-

tion of the mind and the endowment of wisdom, it will be maintained as sound judgment, founded alike in reason and experience, that a great jurist who has had the opportunity and ability to achieve distinction in the field of statesmanship, and has thus enlarged his views of the functions of government and its relations to society, and gained a broader knowledge of the attributes and office of the law, is thereby further recommended for the bench, and entitled to claim special merit and fitness; and that exclusion from the bench for political reasons should extend only to *mere* politicians, whose public reputations are in no part founded upon or owing to any distinction at the bar or in the lore and science of the law, and not to those who are equal to the greatest as jurists, and wise over all as statesmen.

A Conclusive Test.

An unanswerable argument, derived from experience, in favor of this position, is the judicial record of the three Chief Justices whose names have been mentioned. They were all, when appointed, politicians; or, to use the word in its higher acceptation, they were all statesmen, without other than professional reputations as jurists. Yet neither of them was ever excelled in those rare qualities which distinguish the great judge, nor exceeded in the high attainments which are his qualification. Learned in the law they were, and equally learned in politics, in literature, and in the sciences. Without the first accomplishment they would not have consented to accept the place, and without the others they would not have shone so conspicuously in it. The great reputations they earned as judges were, without doubt, due, more than to all other causes, to their profound knowledge of the world, and practical acquaintance with the details of government, obtained in the public service as representatives of the people, and as officers and ministers of state. In the various political stations which they filled they acquired that intimate knowledge of the workings of our complex system of government, of the relations of the several co-ordinate branches to each other, and of the whole to the States which compose it, which enabled them as judges so to adjust the net-work of the fabric—the law—and so to apply

its spirit as to harmonize the parts of the system, and give effect to all those constitutional checks and balances which were devised and intended by the framers to produce and secure a proper equilibrium of power, and thus insure duration —the primary object of all government.

Consequences of a Lack of Public Experience.

And it is owing to the general deficiency in such public knowledge on the part of the judges of the inferior courts, both State and Federal, that we have the frequent conflict of jurisdiction between the authorities they respectively represent, from which the Union has suffered so much in the past, and has so much to fear in the future. On the one hand, a Federal question is not recognized where it exists; and, on the other hand, one is seen where it does not exist. Jurisdiction is assumed and exercised in both cases, judgment is entered, and the result is a certain clash in the execution, if the right has a champion, and, if not, the inevitable enforcement of error. The judges are, in many instances, remarkable only for their unfitness, and seem to have no conception that the petty issues of their obscure tribunals form part of a vast system of jurisprudence which, in some form and in some degree, is affected by their determinations, but proceed as if their jurisdiction was independent and final, and their decisions direc- emanations from the fountain of justice.

The Gravity of the Situation when Mr. Chase was Appointed.

Never was a man, with or without judicial training, assigned a more difficult trust, at a more critical period, than was confided to the late Chief Justice by his appointment as head of the judiciary of the United States. And few have brought to the performance of grave judicial duty higher discretion and firmness, greater ability and moderation, or serener self-possession than did he. These enabled him from the first to fulfill promptly every requirement of the position, and to bear himself as one accustomed to its restraints. He was at home in the traditional gown from the day he took his seat, and his manner was as of one "always and altogether a judge."

His Rank as a Lawyer.

Although Mr. Chase had never claimed great distinction as a lawyer, he had for many years been regarded as an able jurist by those acquainted with his professional career and competent to judge. And being endowed with physical strength equal to his mental energy, he was no sooner commissioned than he entered upon the work of preparation with all the application of which he was capable, and with a firm resolution to do honor to the place, rather than to be honored by it. With this determination he studied the best models of judicial style, familiarized himself with any principle of law his practice had not encountered, and mastered the practice, rules and decisions of the tribunal over which he was to preside. And so well did he accomplish the task that the bar of the court and his brethren on the bench were astonished to find his opinions at once, as one of the latter has expressed it, "models of judicial excellence." His knowledge of every department of the law was discovered to be deep and profound, and his acquaintance with precedents wide as the range of decisions. This was early remarked—so early that one year after his accession, when the writer of this paper first became familiar with the affairs of the court, the fact was already the wonder of the profession, and the exclamation of his late political associates.

His Model as a Judge.

It is clear, from a close comparison of styles, that, unless nature endowed them with such similar mental organizations as to beget in their minds like processes of reasoning, his immediate predecessor, Chief Justice Taney, was his chosen model, and that from habitual study of his works he imbibed from him a manner of judicial composition strikingly identical. There is in their judicial writings the same succinct statement of facts, the same directness in dealing with the main question in a case, and care to avoid irrelevant and immaterial matters suggested in the argument. There is the same skill in grouping, and order in arranging the subjects of discussion, and the same faculty of marshaling conclusions, so that they swell and increase in momentum as the opinion proceeds, and culminate in convincing logic as it concludes. There is the same

elegance of diction, force of expression, and ease and grace in passing from subject to subject. There is the same concentration, the same precision and power, and a like absence of abruptness, coarseness, and incongruity. There is no assertion, no declamation, no prolixity, but, in brief, the presence and absence of everything required to make their opinions exact parallels of judicial completeness and intellectual mastery.

It is not claimed that this eminent jurist was his special study, admiration, and example because he did not find great excellence elsewhere—for to do so would be to do injustice to his estimate of others, and violence to truth—but because Mr. Taney's terse, unimaginative style peculiarly recommended itself to his taste as a forcible and compact form of expression for judicial utterances, better adapted to the uses of reason and logic than the more rhetorical and embellished forms. Marshall was also an ideal of his of what a judge should be; but his more elaborate and metaphorical style had not the sympathetic charm for him which he found in the simple, synthetic sentences of Taney, and which are so remarkably reproduced in his own writings.

His Appreciation of the Trust.

Soon after Mr. Chase's appointment he remarked to a friend that he was to take the place left vacant by Marshall and Taney, and referred to them as two of the greatest judges the world had yet produced, adding that he should have to be a hard student to acquit himself creditably as their successor. But that he has acquitted himself so well, and with such distinction as will give his friends no cause to fear in this behalf, while it will give his own successor ground for apprehension lest there shall be too great a contrast in the records of the two incumbencies, is beyond doubt; and this fact should have great weight with our good President when casting about for the proper qualifications with which to fill the place. No other position in the country bears any relation to this in importance, as the great respect of the people for the office and their reliance upon the court attest; and if there be those who would assume it unhesitatingly, without distrust of their abilities, they are, of all others, the very persons who are not competent to

its duties. The country has already suffered too much from a lamentable, humiliating, and dangerous lack of character, capacity, and integrity on the bench; and it is shown by experience that these failings commonly go together, and are to be found associated in the same person. And of the two, the failure of judicial integrity is least to be feared, for it is readily detected, and is always guarded against; but a lack of capacity is the more to be dreaded, because, unless absolutely disqualifying, it is never remedied, and constantly weakens and discredits the canons of the law.

Importance of Judicial Style and Clearness.—Common Law Excellences.

Concise language and perspicuity in the statement of premises and conclusions were the glory of the common-law jurists, and have immortalized many names in the annals of judicature. And these excellences of style and brevity should be the emulation of those in our country who are charged with the interpretation and application of statutory enactments, in the administration of which there is much room for misapprehension and miscarriage, because of the great diversity of subjects for adjudication. But there seems to be little effort on the part of a great majority of our judges to acquire those virtues of accuracy and explicit enunciation which characterized and still adorn English jurisprudence; and the consequence is that it is an every-day occurrence in our courts to find opposing counsel citing the same case as an authority in support of antagonistic theories, because its points are so carelessly put and its conclusions so loosely drawn that they cannot be understood, and may be construed to meet the necessities of counsel at pleasure. This is a shame to the profession which produces the bench, and to the bench, which, in turn, educates the profession. And to effect improvement in the courts of original jurisdiction it is in the highest degree essential that the appellate tribunals, and especially those of last resort, shall furnish models for their study, instruction, and elevation.

Responsibility for Judicial Appointments.

In view of all this, is it possible to conceive of higher responsibility than devolves upon him who is charged with the

duty of appointing judicial officers? There is some excuse for the people, under the elective system, if they fail to secure the best men for the bench; for they are not fitted to judge of the qualifications of candidates and to choose between them; and if they were, there is no adequate opportunity for conference in respect of public matters open to the mass of electors. And this is probably the secret of the judicial incompetency, grossness, and corruption which prevail in many of our large cities. But there is no apology proper to be offered for the elevation of other than the most eminent ability and unquestioned purity to the bench, where the selection is confided to an intelligent Executive. He has at command the means of ascertaining all the necessary facts touching the fitness of those whose qualifications are considered, and need not fail in his duty to the public.

Momentous Issues which awaited the new Chief Justice.

When Mr. Chase entered upon the duties of Chief Justice the country was in the crisis of its existence. The Union was threatened with destruction by the attempted withdrawal of several of its members, whose people maintained that the Constitution was a compact for purposes of security against a foreign foe only, and was not a voluntary bond on the part of the States to enforce their own *involuntary* adherence to the general government. And whether the power which had been assumed and exercised by the legislative and executive branches to coerce the seceding States, and to preserve the integrity of the Union by force, was lodged in the government by virtue of any provision or intendment of the Constitution, was yet to be authoritatively declared by the other co-ordinate branch. Preceding and following this was a multiform variety of other questions, preliminary and resultant, scarcely less important, raised by the war, which the developments of peace had never evolved for adjudication, and which were then pressing at the bar of the court for that final determination which was to establish a memorable page of precedents for the future government of the country and guidance of the world. Among the earliest of these was a long list of prize and other cases, presenting every class of questions which could proceed from a condition

of civil war, in which the Chief Justice rendered a series of decisions which alone would have placed him in the front rank of jurists, and insured a meed of fame falling to the lot of few judges, and sufficient to fill the measure of an honorable ambition.

The Milligan Case.—Military Commissions in States at Peace.

In his second year the great Milligan case was decided, although the formal opinions were not delivered until the commencement of the next term.

Milligan, a citizen of Indiana, was arrested, tried, and convicted by military commission of conspiring against the government, and sentenced to be hung on the 19th of May, 1865. *Habeas corpus* was issued, and the Circuit Court divided in opinion on the questions presented, and certified them to the Supreme Court for answer. Mr. Justice Davis delivered the opinion of the court, which, by its conservative character and spirit, gave him the prominence he attained as a candidate for the Presidency before the Cincinnati Convention. It was, in substance, that a person who is a resident of a loyal State, where he is arrested, who was never a resident of any State engaged in rebellion, nor connected with the military or naval service, cannot be regarded as a prisoner of war; nor, even when the privilege of the writ of *habeas corpus* is suspended, be tried (the courts being open) otherwise than by the ordinary courts of law. The constitutional guaranty of trial by jury is intended for a state of war as well as for a state of peace; and military commissions, organized during the late war in a State not invaded and not engaged in rebellion, in which the Federal courts were open and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offense a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service. *And Congress could not invest them with any such power.*

The Power of Congress.

To all of this the Chief Justice assented, except as to the declaration that it was not in the power of Congress to author-

ize such a commission to do such an act at such a time, and except as to the conclusion that when the privilege of the writ of *habeas corpus* is suspended there are no cases in which trial and punishment by military commission, in States where civil courts are open, may be authorized by Congress. In a dissenting opinion as to these particulars, citing the case of Indiana as a military district and an invaded State, he said:

"We cannot doubt that in such a time of public danger Congress had power under the Constitution to provide for the organization of a military commission, and for trial by that commission of persons engaged in the conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and in the unobstructed exercise of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

"In Indiana the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies."

Mr. Justice Davis had said in his opinion, that civil liberty and this kind of martial law could not endure together—that they were in irreconcilable antagonism, and in the conflict one or the other must perish; for the nation cannot be always at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution; and that the time might come when wicked and ambitious men would fill the place once occupied by Washington and Lincoln; and if this right were conceded, and the calamities of war should befall us again, the dangers to human liberty are frightful to contemplate; and that if our fathers had failed to provide against just such a contingency, by rendering it impossible for an unscrupulous Executive to usurp the government, they would have been false to the trust reposed in them.

A Wide Variance of Judicial Opinion.

Here was a wide difference in judicial opinion on the subject of the distribution and restriction of the powers of gov-

ernment under the Constitution, and upon the question of the sources of danger to the Union, and which very evenly divided the court. The Chief Justice and three associate justices preferred to trust the exercise of a dangerous but necessary power in time of war to the Executive chosen by the whole loyal people, rather than to confide it to the discretion of a sectional tribunal which, in consequence of secret disloyalty, might decline to enforce it. And they believed the framers of the republic had entertained this view, and so constructed the organic law as to give it effect. Mr. Justice Davis and four of his associates saw no such danger of a failure of justice in the courts at such a time as would justify the investiture of the President with arbitrary authority, which was liable at any moment to be unduly exerted; and they believed that the fathers had provided against such executive supremacy. And it remains to be seen by future generations which is correct, the intimation of danger from executive usurpation, or the apprehension of evil from a corrupt or disloyal judiciary; and also, by inference, which of these was the contingency foreseen and provided against by the authors of the Constitution. The decision was on the side of the judiciary; the dissent in favor of the executive. Time only will try the conclusions.

Effect of Life Associations Upon the Judgments of Men.

It is interesting to note in a case like this the marked influence of life associations upon the minds even of the best and wisest of men, as affecting their judgments through their sympathies. Judge Davis, raised and remaining in the atmosphere of the courts, and further allied to them by a considerable judicial term, was firm in the assertion of civil jurisdiction, and quick to repel attempts at executive encroachment; and long accustomed to combat the assumptions of the political departments, he was naturally distrustful of their tendencies and jealous of their power.

The Chief Justice, although then honoring supreme judicial position, had early entered and late remained in the political departments, and became as fully imbued with their sympathies and aspirations as had Judge Davis with the spirit of the judicial department. It was equally natural, therefore, that

while striving to be, and believing himself wholly unbiased, he should respond to kindred impulses, and that regarding his experience in the political departments as best qualifying him to judge of the necessity of extreme measures in conjunctures of extreme peril, and feeling that the decision was a blow to the efficiency of the government, he should be impelled to arraign the principle affirmed by a majority of the court as an insufficient postulate, and to declare his conviction that the wisdom of the founders accorded with this view, and intended that such a power should reside in the executive, and prevail in the emergency of war when the public safety required it. And for the whole of his professional life having suffered defeat at the bar of the courts,* by alleged judicial evasion, in attempts to gain recognition of certain political rights, now established by revolution, which he believed to be clearly constitutional, it is not surprising that he should doubt the certain efficiency of the civil judiciary at any time, and for that reason withhold his assent to the proposition that it shall be sole arbiter of justice in time of public danger.

THE EXECUTIVE AND THE JUDICIARY.—THE CHIEF JUSTICE INCLINES TO THE SIDE OF THE FORMER.

Fresh from the absorbing consultations of the executive council, and conscious of its integrity and devotion to liberty, as tested by his own experience and established by results, he could not permit even its future patriotism to be questioned from the bench, without pointing out to the latter the danger of its own defection. Had it been his good fortune to live to the ripe age of his predecessor and judicial prototype, it is possible, and even probable, that thirty years of term routine would have deadened the old and begotten in him new sympathies, more in harmony with the dull monotony of the bench, but less likely to inspire that wholesome interest in public questions and watchful vigilance of public affairs which preserve the animation and usefulness of the judge, renovating his mind, augmenting his knowledge, and giving strength, vigor, and comprehensiveness to his decisions.

* In conteste under the Fugitive Slave Act—Mr. Chase being always the champion of the fugitive who had escaped across the border to Cincinnati, and there sought to resist rendition

JUDICIAL CHARACTER AND HABITS.—DANGER OF DEVOTION TO EXCLUSIVE SUBJECTS.—THE SECRET OF INTELLECTUAL POWER.

And without some attention to public matters, some interest in current events, there is danger of the approach of that destroying malady of those who would be "altogether judges," which perhaps may be not inaptly termed judicial crystallization—a sort of metempsychosis of the mind by which it passes from the state of personal consciousness and natural sympathies to a condition of morbid abstraction and abnormal devotion, and relinquishing all other aims and aspirations as unworthy, heroically dedicates itself to the perpetual contemplation of judicial ends and essences, as if their proper study required a sacrifice, and they were arbitrary and abstract principles, perfectly ascertained, and to be uniformly applied as contained in the repositories of judicial learning, and were not simply the collected results of human experience, reduced to systems of government and rules of conduct ever undergoing modification and change in the progress of civilization, and to be as carefully sought and as profitably studied on the latest pages of the open volume of life, as in the dusty tomes of libraries whose precedents perish with their coverings along the pathway of the generations. Instances of such consecration and absorption are frequent, but the cause is generally misapprehended. That habitual absence of mind which is popularly regarded as an indication of fixed and fathoming thought, is but the listless reverie of mental *ennui* or enervation, proceeding with legitimate certainty from the strain of a mind unrelieved or overwrought in the investigation and exposition of exclusive subjects. Strong, active minds, invigorated by diversified thought, have no such infirmity. And busy men of the world experience no such weakness in grasping the actual of life's concerns. It is the offspring of weariness and apathy, and wherever detected is an evidence of impaired faculties, of diminished powers, of insipient intellectual retroversion. If it would be avoided by the bench, the functions of the judge and the faculties of the man must be equally and evenly exercised, and the senses of the body must be indulged with healthful excitement, even if in direct opposition to the

inclinations or prejudices of the mind. The soul draws its inspiration from the senses, which it refines and elevates; and when, in obedience to the behests of virtue, it seeks to gain the ascendency by denying them proper gratification, it does but waste its own vitality, weaken its power over the propensities, and by precipitating psychomachy, destroy all. To preserve *mens sana in corpore sano*, sustain the judge and succor the man, there must be equilibrium of the mental and physical forces, and union of the judicial and personal characters. Where this rule occurs there is true greatness; where it does not, there is chance result.

The Test Oath Cases.—Rebel Theology relieved from Proscription.—Religious Freedom.

Following the Milligan case came the scarcely less noted Test Oath cases from Missouri and Arkansas, which resulted in a decision against the validity of such an oath as a means of establishing the fact of loyalty, on the ground that, under the form of creating a qualification or attaching a condition, the States cannot in effect inflict punishment for a past act which was not punishable when the act was committed, the court holding the new constitution of Missouri, requiring clergymen to take an oath that they had never given aid or comfort to or sympathized with the rebellion, as a condition precedent to their entering upon the duties of their vocation, and the act of Congress of 1865, prescribing a similar oath to be taken by lawyers before being permitted to practice in the Federal courts, to be in this *ex post facto* in their operation, and void.

The Chief Justice Again Leans to the Side of Strong Government.

In these cases the Chief Justice again took the unpopular side, again leaning to the side of the government, and concurred in an opinion written by Mr. Justice Miller, maintaining that the purpose of the oath prescribed in each case was to require loyalty as a qualification, and not to punish past acts of disloyalty, and that it was therefore within the competency of State authority to impose. And it was said that the *ex post facto* principle which the majority of the court had discovered in the laws to be affected by their decision could

"only be found in those elastic rules of construction which cramp the powers of the Federal Government when they are to be exercised in certain directions, and enlarge them when they are to be exercised in others." "No more striking example of this could be given," it was added, "than the cases before us, in one of which the Constitution of the United States is held to confer no power on Congress to prevent traitors practicing in her courts, while in the other it is held to confer power on this court to nullify a provision of the constitution of the State of Missouri." Touching the sanctity of the ministerial office, and the inviolability of religious freedom in this country, which had been dwelt upon at length by counsel in the Missouri case, it was said that no restraint had been placed by the Constitution of the United States upon the action of the States in respect of the subject of religion; but that, on the contrary, in the language of Judge Story, "the whole power over the subject of religion is left exclusively to the State Governments, to be acted upon according to their own sense of justice and the State constitutions." The majority of the court having held that the pardon of the President relieved the petitioners from all disabilities of whatever character, the dissenting opinion, conceding the fullness of the pardoning power, answered that if the oath prescribed was not a punishment, but merely a requirement of loyalty, as held therein, then the pardon of the President could have no effect to relieve parties from taking it. If it was a qualification which Congress and the States have a right to require, the President could not, by pardon or otherwise, dispense with the law requiring such a qualification.

The writer remembers to have seen the Chief Justice by impatient gestures put away interruptions by officers of the court, and give undivided attention as the Hon. Reverdy Johnson, then a Senator and now a private citizen, the Hon. M. H. Carpenter, then a private citizen and now a Senator, and David Dudley Field, Esq., then and now a private citizen, exerted their high powers in behalf of the petitioners in these cases and of the principle involved; and distinctly recalls the expressions of disappointment which fell from counsel when it was known by the decision that he was one of those who sus-

tained the "oath of loyalty" in Missouri, and the "iron-clad oath" in the Federal courts.

The Great Question of the Age.—Power of the Government to Maintain the Union.

Then came the great question, paramount over all, of the power of the government under the Constitution to preserve itself and maintain the Union by force against the will of the States. Not so important because of the fact of preservation, for that was already accomplished, but because it was to be determined whether the success of the government was the result of the exercise of its legitimate powers, and therefore the triumph of a precious right, or was the chance event of the use of unjust, arbitrary, and oppressive measures, executed by superior force, in violation of the Constitution and the reserved rights of the States, and therefore the consummation of a grievous wrong. And in view of the incalculable effect which the decision of this momentous question, whatever it should be, was to have upon the destinies of man in its influence upon the judgment of the nations of the merits of popular government, it is justly entitled to be regarded as the most superlative question ever presented for the consideration of an earthly tribunal. Its solution was to increase the confidence of the world in the permanence of republican institutions, and accelerate their general adoption by demonstrating that their organization is not inconsistent with strength and stability, or it was to subject them to reproach and repudiation as conferring no protection on the person and property of the citizen, because affording no guaranty of perpetuity. Upon it depended the continuance of our republic as a constitutional government, and upon that contingency depended the further progress of liberty and equality among men. Neighboring monarchies looked on with malignant satisfaction, hoping and expecting to see the last experiment of free government perish forever, and their rulers secretly coalesced to accomplish that result. Patriots every where desponded and freedom languished, while kings and courtiers rejoiced and crowns were reassured.

THE SWIFT CONCLUSIONS OF THE ENEMIES OF THE REPUBLIC.

The collapse of the republic was from the first regarded as certain by its enemies, if not by successful revolution, still as surely by a fatal variance between its several departments, leading to such a departure by the executive from the constitutional interpretations of the judicial branch as would paralyze, and at last destroy it. If, exulted they, the judiciary should hold the Union under the Constitution to be based upon the consent of the States, and that these could withdraw at pleasure and terminate its existence beyond the rightful authority of the Federal power to sustain it by force, and the government should accept that judgment and respect the decision, there is an end of the Union. If the government should disregard the judgment and override the judiciary, it would be but the first step of a series by which it would indubitably glide away from its base and ultimately become the worst form of despotism—a military dictatorship. And if, on the other hand, the judiciary should deny the right of secession, and sanction the course of the political departments, it would be a forced construction of the Constitution, infinitely worse than the forced preservation of the Union without it, amounting to a voluntary abdication of justice, and permitting the final overthrow of liberty by the strong arm of centralization, whose encroachments would in the end result in usurpations more odious and oppressive than monarchy itself.

Thus powers professing to be friendly, but in truth actuated by ill-concealed enmity, prematurely consigned our palladium to anarchy and oblivion in any event, beyond conceivable doubt, and congratulated themselves and the cause of royalty upon the downfall of the American republic and the eternal extinction of the federative principle. But, happily for us and for mankind, the result was different. Before the question was reached by the courts the danger from revolution was passed, and the only solicitude was that the means adopted to save the country should be justified by judicial sanction. And when at last the question was decided, the judiciary upheld the construction placed upon the Constitution by the executive and legislative branches of the government, not in obedience to

popular clamor, but on grounds which are unanswerable in any forum, and which command the respect and confidence of Federal and "Confederate" citizens alike. The three departments were in harmony upon the question of the character of the government and the nature of its powers, and in accord as to the means invoked to preserve and enforce them.

THE CONSTITUTIONAL VIEW OF THE RELATION OF THE STATES.

The case of Texas *v.* White presented the question in a direct form, and the Chief Justice delivered the opinion of the court, from which we take three consecutive paragraphs of conclusive reasoning, as follows:

"The Union of the States never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble, if a perpetual Union made more perfect, is not?

"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still all powers not delegated to the United States nor prohibited to the States are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term that 'the people of each State compose a State, having its own government, endowed with all the functions essential to a separate and independent existence,' and that 'without the States in union there could be no such political body as the United States.' (Lane *v.* Oregon.) Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

"When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through the consent of the States."

What could be more clear, concise, and convincing than this? How simple the logic! "*What can be indissoluble, if a perpetual union made more perfect, is not?*" How grand the conclusion! "*The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.*"

THE EFFECT OF THE DECISION ON THE DESTINIES OF NATIONS.

Thus definitively was the great question settled. And following it a thrill of joy went round the earth. The freest and best country known to man was saved to representative government, redeemed from reproach and justified before the world; and wherever power is prescriptive and rights are prerogative, except as the gifts of princes, there were souls to rejoice. The oppressed in all lands felt that they had still a secure asylum, and republican subjects of Eastern kings and conquerors rapturously saw through the breaking clouds the triumphal arch of Freedom in the West—the bow of promise on the brow of Empire. That there was such an ark of safety for human hopes and happiness as a composite republic, with a constitutional government operating directly upon the people irrespective of sectional limits, entitled to their undivided allegiance, and clothed with adequate power to protect and defend itself against all foes, from within as well as from without, was an annunciation which shook thrones and gladdened continents. The suppressed republicanism of France and Spain asserted itself in answer to this invitation at the first opportunity, and the leagued assaults upon the unhappy republic south of us, at a time when the act was deemed safe by reason of our domestic difficulties, was punished, and the blood and carnage of Maximilian's reign and fall were avenged. The same spirit openly,

declared itself in the limited and milder monarchy of Britain, and loyal subjects of the crown who had stealthily given aid and comfort to our revolting States, and contributed to the fullest demand toward the success of the rebellion, now tremble at the signs of retribution at home and abroad. And the government which winked at their violations of public law, and connived with them to break the shield of democracy in America, and prop the crumbling dynasties of Europe, now shrinks with dismay from the contemplation of republican progress on the soil of sceptres, and hopes to stay the tide of revolution by encouraging still further contributions in the interest of monarchy, to sustain the armies of the Carlists in the field, and the agents of the Bourbons in the forum.

Such are the fruits of our triumph. For who believes that had the rebellion succeeded, and our Union been dissolved, there would have been any tidings of republicanism in Europe to-day? No one. On the contrary, it was and is the universal assent that the overthrow of the government of the United States would silence its advocates, stifle its principle, and rob the world of refuge and freedom of a home for centuries to come.

Powers of de facto Governments.

The next case of general interest, in point of time, was one of the first importance to the people of the South, involving as it did their entire business and social relations, by jeopardizing civil contracts made while subjected to Confederate authority. It was the case of Thorington *v.* Smith, from Alabama, determining for its main question whether contracts for the payment of Confederate money, made during the rebellion between parties residing in the Confederate States, could be enforced in the Federal courts. The Chief Justice delivered the opinion of the court, and in the course of it, after defining the Confederate government as one of paramount force, said:

"It seems to follow as a necessary consequence from the actual supremacy of the insurgent government as a belligerent within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory

of the United States. Contracts stipulating for payment in this currency cannot be regarded, for that reason only, as made in aid of the foreign invasion in the one case or of domestic insurrection in the other. They have no necessary relations to the hostile governments, whether invading or insurgent. They are transactions in the ordinary course of civil society, and though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligations."

Thus the necessary dealings of the people over whom the Confederate States exerted government were sustained, the obligations of contract left unimpaired, and a conclusion avoided which would have overturned all titles and destroyed all ownership at the South, and seriously have disturbed the well-being of society.

The Legal Tender Cases.

Public familiarity with the Legal Tender cases, in consequence of the direct effect of the decision upon all the affairs of the people, renders an extended statement of the points decided unnecessary. In Hepburn *v.* Griswold, the Chief Justice delivered the opinion of the court, holding, in effect, that there is no grant of power in the Constitution, express or implied, authorizing Congress to make any description of credit currency a legal tender in payment of debts. These views of the Chief Justice took the country somewhat by surprise, as it was generally supposed that the Legal Tender act was his special measure, as a financial necessity, when Secretary of the Treasury. And in the subsequent cases of Knox *v.* Lee and Parker *v.* Davis, overruling this decision (the court being differently constituted), Mr. Justice Strong, who delivered the opinion, after holding substantially that the power to issue legal tenders exists, because such notes may at any time become a necessity to the end of preserving the government, adverted to Mr. Chase's agency in their issue, in this instance, thus:

"It is an historical fact that many persons and institutions refused to receive and pay those notes that had been issued, and even the head of the Treasury represented to Congress the necessity of mak-

ing the new issues legal tenders, or, rather, declared it impossible to avoid the necessity."

MR. CHASE AS SECRETARY OF THE TREASURY AND CHIEF JUSTICE. —TRIUMPH OF THE MAGISTRATE OVER THE MINISTER.

The answer of the Chief Justice to this representation is all in respect of these cases which remains of interest in this connection. It was as follows:

"The reference made in the opinion just read, as well as in the argument at the bar, to the opinions of the Chief Justice, when Secretary of the Treasury, seems to warrant, if it does not require, some observations before proceeding further in the discussion.

"It was his fortune at the time the legal tender clause was inserted in the bill to authorize the issue of United States notes, and received the sanction of Congress, to be charged with the anxious and responsible duty of providing funds for the prosecution of the war. In no report made by him to Congress was the expedient of making the notes of the United States a legal tender suggested. He urged the issue of notes payable on demand in coin, or receivable as coin in payment of duties. When the State banks had suspended specie payments, he recommended the issue of United States notes, receivable for all loans to the United States and all government dues except duties on imports. In his report of December, 1862, he said that 'United States notes receivable for bonds bearing a secure specie interest are next best to notes convertible into coin,' and after stating the financial measures which in his judgment were advisable, he added: 'The Secretary recommends, therefore, no mere paper money scheme, but, on the contrary, a series of measures looking to a safe and gradual return to gold and silver as the only permanent basis, standard, and measure of value recognized by the Constitution.' At the session of Congress before this report was made, the bill containing the legal tender clause had become a law. He was extremely and avowedly averse to this clause, but was very solicitous for the passage of the bill to authorize United States notes then pending. He thought it indispensably necessary that the authority to issue these notes should be granted by Congress. The passage of the bill was delayed, if not jeoparded, by the difference of opinion which prevailed on the question of making them a legal tender. It was under these circumstances that he expressed the opinion, when called on by the Committee of Ways and Means, that it was necessary; and he was not sorry to find it sustained by respected courts, not unanimous indeed, nor without contrary decisions of State courts equally respectable. Examination and reflection under more propitious circumstances have satisfied him that this opinion was erroneous, and he does not hesitate to declare it. He would do so just as unhesitatingly if his favor to the legal tender clause had been at the time decided, and his opinion as to the constitutionality of the measure clear."

This statement of the Chief Justice, which has never before been made public, explains any apparent conflict of view between his financial and judicial opinions, and shows his judgment to have been that the legal tender clause was rather a necessity to the prompt passage of the currency bill than to its successful operation if passed without it; for he says in the course of his opinion that this clause was a confession on the part of the government that the notes would not be received except by compulsion, and that the tendency of such a confession was to depreciate the value of the currency and the credit of the country.

Candor that was Great as Rare.

The statement also exhibits in the character of the Chief Justice that rare quality of public men, the candor to confess past doubt and indecision when once grounded in judgment and confirmed in opinion by better opportunities for reason and reflection. The pressure of events in public affairs, especially under the circumstances of this case, may well excuse assent without the sanction of judgment by a public officer, when dissent is the exception, and the popular voice demands the concession, the difference of opinion being of less moment than united and immediate action.

Validity of Prior Contracts Affecting Slave Property.

An important question following emancipation was upon the validity of prior contracts affecting property in slaves; and the case of Osborn *v.* Nicholson, from Arkansas, disposed of it, with the concurrence of the Chief Justice, in a just and satisfactory manner. The decision was—Mr. Justice Swayne delivering the opinion of the court—that negro slavery having been recognized as lawful at the time and the place of the contract, and the contract having been one which at the time when it was made could have been enforced in the courts of every State in the Union, and in the courts of every civilized country elsewhere, the right to sue upon it was not to be considered as taken away by the Thirteenth Amendment, passed after rights under the contract had become vested, the destruction of vested rights by implication never being presumed.

SOVEREIGNTY IN THE TERRITORIES.—MEASURE OF SELF-GOVERNMENT CONCEDED TO THE PEOPLE.

The case of Clinton *v.* Englebrecht, bringing to this court for decision the contest between the Territorial and United States marshals in Utah concerning the summoning of juries, establishes an important principle in respect of Territorial organizations, which is of sufficient interest to be set forth here. It was held—the Chief Justice delivering the opinion—that the theory upon which the various governments for portions of the Territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of the national authority, and with certain fundamental principles established by Congress. And the fact that judges of the District and Supreme courts of the Territories are appointed by the President under acts of Congress, does not make the courts which they are authorized to hold "courts of the United States." Such courts are but the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States. Accordingly, jurors summoned for duty therein under the acts of Congress applicable only to courts of the United States created under the article of the Constitution which relates to the judicial power, are wrongly summoned, and a judgment on their verdict, if properly objected to, cannot be sustained. This was a victory for the Territorial officers over the marshal of the United States, and even over the judges of the courts—for the latter had sustained the proceedings of the former—and is a judicial enforcement in a modified form of the old-time theory of squatter sovereignty, or of the rights of the settlers in the Territories to manage their own affairs in their own way. And it is said that the "Trustee in Trust of the Church of Jesus Christ of Latter-day Saints" regarded it as sanctioning the right of the people of the Territory to establish such domestic institutions as they choose, including polygamy. But whether it extends to that extremity will better appear in the light of future events.

CONSTRUCTION OF THE THIRTEENTH AND FOURTEENTH AMENDMENTS.—THE QUESTION OF MONOPOLY.—RIGHTS OF CITIZENS.

The last great question in the decision of which the Chief Justice participated was but recently decided, in the Slaughter-House cases from Louisiana, placing a construction upon the Thirteenth and Fourteenth Amendments. In those cases it was complained that the Legislature of Louisiana had chartered a slaughter-house company, granting, among other exclusive privileges, for a period of twenty-five years, to seventeen persons, the right to establish and maintain stock-yards, landing-places, and slaughter-houses for the city of New Orleans, at which all stock must be landed, and all animals intended for food must be slaughtered. This charter was attacked as creating a monopoly so effectual as to deprive the butchers of the State of the right to continue the business of their lives, unless they would submit to such terms as might be imposed by the company. And this, it was maintained, was in violation of the Thirteenth Amendment, which forever prohibits slavery and involuntary servitude in the United States; the argument being that the seventeen persons composing the company were the *dominants* of the business monopolized, and the butchers of the State its *servients*, in such a manner and to such a degree as to render them the involuntary subjects and slaves of an artificial person representing the authority of the State. It was in contravention of that provision of the Fourteenth Amendment which declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The opinion of the court, delivered by Mr. Justice Miller, stated in brief, sustained the grant of privilege contained in the charter, under the conditions and limitations imposed, as being a police regulation within the power of the State Legislature, unaffected by the Constitution of the United States previous or subsequent to the Thirteenth and Fourteenth Amendments. It was not affected by the Thirteenth Amend-

ment, which refers to and is applicable only to personal servitude and not to servitude attached to property, and had for its direct object the permanent freedom of the negro race. Nor was it affected by the Fourteenth Amendment, which distinguishes between citizenship of the United States and citizenship of the States, and refers only to the privileges and immunities of citizens of the United States, and not to the privileges and immunities of citizens of a State (rights of property, etc.), and was not intended to protect the citizen of a State against the legislation of the State. The objection that the State has deprived the butchers of liberty and property without due process of law was held to be unsound under former judicial interpretations of the Fifth Amendment, which contains a similar prohibition; and the clause prohibiting the States from denying to any person the equal protection of the laws was construed as being intended only for the protection of the negro against partial legislation by the States.

THE CHIEF JUSTICE OPPOSED TO MONOPOLIES.—ASSENTS THAT THE FOURTEENTH AMENDMENT PLACES THE COMMON RIGHTS OF AMERICAN CITIZENS UNDER THE PROTECTION OF THE NATIONAL GOVERNMENT.

The Chief Justice concurred in a dissenting opinion delivered by Mr. Justice Field, holding, in substance, that the slaughter-house company is an odious monopoly, exceeding the limits of the police power of the State, swallowing up the right to pursue a lawful and necessary calling previously enjoyed by every citizen; and that if such exclusive privileges can be granted to seventeen persons, they may, in the discretion of the Legislature, be equally granted to one individual. And if they may be granted for twenty-five years, they may equally be granted for a century, and in perpetuity. Conceding the force of the argument made by counsel for the petitioners under the Thirteenth Amendment, it was not considered necessary to the disposition of the cases in their favor to accept it as entirely correct. But the Fourteenth Amendment was regarded as covering the whole question. It was adopted to obviate objections to the Civil Rights act, and to place the com-

mon rights of American citizens under the protection of the national government. A citizen of a State, by virtue of that amendment, is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a freeman and a free citizen now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. They do not derive their existence from State legislation, and cannot be destroyed by its power.

Under the Fourth Article of the Constitution, providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the United States," no State could create a monopoly in any known trade or manufacture in favor of its own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture attempted to be monopolized by citizens of other States. And what that clause does for the protection of citizens of one State against the creation of monopolies in favor of citizens of other States, the Fourteenth Amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, wherever resident, are secured against abridgment in any form by a State. The Fourteenth Amendment places them under the guardianship of the national government. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law in the great case of Monopolies decided in the reign of Elizabeth. To citizens of the United States everywhere, all pursuits, all professions, all avocations, are open, without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition; and the Fourteenth Amendment makes it essential to the validity of the legislation of every State that this equality of right shall be respected.

The opinion concludes with an expression of regret that the validity of the legislation in Louisiana—so widely departing from the principle of equality—is recognized by a majority of the court; for by it, it is declared, the right of free labor,

one of the most sacred and imprescriptible rights of man, is violated.*

WOMAN'S RIGHT TO PRACTICE THE PROFESSIONS.—AN ADVERSE OPINION SANCTIONED BY THE SEX.

A case of some significance, decided at the same time, and, in effect, by the same opinion, was that of Mrs. Bradwell, of Illinois, who sought to be admitted as an attorney in the courts of that State, and was refused by the Supreme Court on the ground that females are not eligible under the laws of the State. The judgment was affirmed here, Mr. Justice Miller delivering the opinion, which held that the right to practice law in the State courts is not a privilege or immunity of a citizen of the United States within the meaning of the Fourteenth Amendment, and that the power of a State to prescribe the qualifications for admission to the bar of its courts is unaffected by that amendment, and this court cannot inquire into the reasonableness or propriety of the rules it may prescribe.

Justices Swayne, Field, and Bradley concurred in the judgment, but not for the reasons assigned in the opinion of the court; and Mr. Justice Bradley read an opinion setting forth their views, denying "that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life."

THE CHIEF JUSTICE LEAVES NO RECORD OF HIS VIEWS.

The Chief Justice dissented from both of these views, but left of record only that fact to attest his own.† It is known,

* This decision revolutionized the Court; causing Mr. Justice Miller, the sturdy supporter of strong government, and Mr. Justice Field, the steadfast friend of State Rights, to appear to have exchanged positions.

† The following from Mr. Justice Bradley, under date of 22d August, 1873, furnishes the only inkling of the views of the Chief Justice on the question raised by this case the author was able to obtain; and as it states very concisely and clearly the gist of the opinions read, it is given as a note to the case:

"I am afraid I cannot give you any light on Chief Justice Chase's views on the question of woman's right to practice the learned professions, except this: that I know he believed in the right, and on that ground would have dissented from the judgment of the court if necessary. On what ground he thought the

however, that he did prepare a written dissent, in which he briefly reviewed the two opinions, and arrived at the conclusion that *no principle was involved in the decision.* The dissent was based upon the same objections to the construction placed upon the Fourteenth Amendment by a majority of the

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point not involved in the Myra Bradwell case, I do not know, having never heard him say. The position of the other judges, in brief, was this: Without determining the question whether a woman is entitled by right, as a citizen of the State, to follow all lawful pursuits, and enjoy all privileges enjoyed by men—five judges, Clifford, Miller, Davis, Strong, and Hunt, held, that the United States tribunals have no jurisdiction either before or since the Fourteenth Amendment to determine such a question, or any question concerning the rights of the citizen, except federal rights, *i. e.*, rights expressly given by the Constitution or laws of the United States, and except where the United States tribunals are sitting as judges of State law; and the other three, Swayne, Field, and Bradley, held that it is a matter within the powers of the State Legislature to determine the status of woman in the civil state; and that having determined it, the Supreme Court cannot change it. Our judgment was based on the idea that the Fourteenth Amendment only guaranteed against State invasion either of rights expressly given by the Constitution and laws of the United States, or fundamental rights attaching to all citizens as such; and that the right of woman to participate in all civil employments is not a fundamental right beyond the power of the State Legislature to regulate."

In this connection it may be related, that while the opinion of Justice Bradley, so far as it dealt with the merits of the case, doubtless as fully reflected the views held by the judges whose concurrence authenticated the judgment, as it did those entertained by the judges who expressly joined in it, and was thus unanimous on the main question, except as to the Chief Justice, the author happens by chance to know that it had the still higher sanction of the sex most concerned in the decision, through one whose distinguished social position, high character, and eminent good sense entitled her opinion to be regarded as an exponent of its views, in so far, at least, as they may be deemed to emanate from approved intelligence and worth.

In a conversation touching the case and his opinion, while this paper was in course of preparation, Justice Bradley playfully remarked that he was the better satisfied with it because it had the approbation of his wife, who, on having the question presented to her, expressed her views very decidedly and emphatically against the idea of women becoming or practicing as lawyers; and declared that it was abhorrent to all the finer feelings of delicacy that ought to characterize every pure and respectable woman. He looked upon these utterances, he said, as the spontaneous expression of womanhood, and for that reason he thought them of value.

As this fact, hitherto remaining a social secret, has much public interest as an incident of the case, and special significance for the ladies, Justice Bradley has considerately consented that it may be stated, kindly undertaking to answer to Mrs. Bradley for the allusion.

court which were stated by Mr. Justice Field in the Slaughter-House cases. And it was declared that no principle was established by the decision, because it did not touch upon the great social question lying at the foundation of the proceeding —the right of women—under the Constitution of the United States, as amended—to engage generally in the professions and occupations of civil life—but only decided the question of the effect of the Fourteenth Amendment upon the *status* of the petitioner as a citizen of a State.

By this dissent the Chief Justice revealed no new judicial conviction nor political sympathy; but his non-concurrence with Justices Swayne, Field, and Bradley may be considered as equivalent to an assertion of the rights and relations which they denied.

Magnitude of the Issues Decided.

We have now reviewed the leading cases in the record of the late Chief Justice as fully as the purposes of a popular article would admit of, referring only to others of almost equal importance which it has been impossible to notice; and it is unhesitatingly submitted to his countrymen that none of his predecessors were ever called upon to consider questions so grave, so pervading and far-reaching in their consequences, as some of those here presented—questions which go to the foundation and structure of the government, and touch its very right to exist; which led to its origin, have attended its progress, and will pursue its future—questions which proceed not alone from union and peace, with which all our judges are more or less familiar, but grow out of the conditions of disunion and war, and affect society and the people in their dearest interests and most sacred rights—those exposed to danger and liable to be trampled upon and extinguished in times of public peril.

Singular Good Fortune of the Chief Justice.

It was the great good fortune of the Chief Justice to survive until all the issues of the war were settled, and to participate personally in their determination; and the impartial manner in which he passed upon them—so far as man may be impartial—condemning, as we have seen, in a notable instance,

one of the most conspicuous measures of his own administration of a department of the government, is the highest evidence of his devotion to justice and fidelity to the country, and the best illustration of his noble qualities as a freeman intent upon preserving the rights of freemen. *Magistratus indicat virum.*

Future Value of His Adjudications and Example.

His opinions will largely control political questions in future republics, and form the chief bulwark of the people in seasons of danger, as they are mainly directed to the discussion and elucidation of principles entering into the civil polity of such governments, and particularly affecting their administration in time of war; and they must necessarily be in many instances, from the peculiar nature of the cases considered, sole precedents in point. They will be cited abroad and studied at home with equal profit to the profession, benefit to the bench, and advantage to the people. And should those who come after him seek a mould in which to cast judicial composition, or a type upon which to form judicial character, they may rest upon his writings, and build upon his virtues. And should ambition further pursue the secret of high career, and ask a chart of judicial life, it may still be pointed to the vacant chair of the Chief Justice, and receive for answer the matchless reply which Euripides relates was made to Zeno by the oracle at Delphi, upon his inquiry in what manner he should live—"That question should be addressed to the dead."

SKETCH

OF THE

LIFE AND JUDICIAL LABORS

OF

CHIEF-JUSTICE SHAW.

By BENJAMIN F. THOMAS.

Reprinted from the Proceedings of the Massachusetts Historical Society,

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LEMUEL SHAW was born in Barnstable, Mass., on the 9th of January, 1781, within three months from the time when the Constitution and frame of government, under which his life was to be spent, and which his judicial labors were to illustrate, went into operation. His father and grandfather were clergymen. His grandfather, John Shaw, the minister of Bridgewater, educated four sons at Harvard College, all of whom became Congregational ministers. Of these, the Rev. Oakes Shaw, the father of Lemuel, was settled in the West Parish in Barnstable, in 1760, and continued in the pastorate till his death in 1807. That he was faithful to his people, and that they loved and honored him, this long connection would show; though we are not to forget, that pastors were not then settled on horseback, with a view to early removal, and that "Providence" did not then so often call rising young ministers from small rural parishes to opulent city ones.

The son always spoke of his father with the highest veneration and respect; never without emotion. At the centennial celebration at Barnstable in 1839, more than thirty years

after his father's death, he thus touched upon a subject always near to his heart: —

"Almost within sight of the place where we are, still stands a modest spire, marking the spot where a beloved father stood to minister the holy word of truth and hope and salvation to a numerous, beloved, and attached people, for almost half a century. Pious, pure, simple-hearted, devoted to and beloved by his people, never shall I cease to venerate his memory, or to love those who knew and loved him. I speak in the presence of some who knew him, and of many more who, I doubt not, were taught to love and honor his memory, as one of the earliest lessons of their childhood."

The mother of Mr. Shaw, was Susannah Hayward, of Braintree. She was the sister of Dr. Lemuel Hayward, an eminent physician of Boston, from whom her son was named. Mrs. Shaw was a woman of vigorous powers, mental and physical. She lived to see and enjoy the success and honors of her son; dying under his roof in 1836, at the extreme age of ninety-four. How much of our history is crowded into that life, — the "Seven Years' War;" the War of Separation and Independence; the struggle for national unity, for commercial freedom; the birth and maturing to manhood of a great nation!

Lemuel was fitted for college in part by his father, and partly at Braintree. In 1796, at the age of fifteen, he entered the Freshman Class at Cambridge. During the winter vacations of the last three years, to help pay the college bills and relieve his father, he kept a district school. In the way of discipline and preparation for active life, we doubt not those winter vacations were worth more than any part of the college course. Indeed, no man thoroughly understands New-England life and manners who has not kept a district school and "boarded round."

The Class of 1800 had in it three, at least, marked men: Washington Allston, the painter-poet; the eloquent and saintly

Buckminster; and Lemuel Shaw. Other eminent men were President Bates, of Middlebury College; the Rev. Dr. Lowell; and Timothy Flint, whose letters from the valley of the Mississippi charmed everybody, forty years ago. Lemuel held a good rank in his class, and at commencement took part in a Greek dialogue with Timothy Flint.

Upon leaving College, Mr. Shaw was, for a year, usher in the Franklin, now Brimmer, School, in Boston. During the same year, he was a writer, or assistant editor, for the "Boston Gazette." The "Gazette" was an ardent supporter of the Federal party and politics. At this time the paper had several able contributors, — Robert Treat Paine, Jr., author of "Adams and Liberty," who wrote the dramatic articles and criticisms; Thomas O. Selfridge, soon to acquire so unhappy a distinction; David Everett, then at the bar, but afterwards first editor of the "Boston Patriot;" and, above all, Fisher Ames.

At the end of the year, Mr. Shaw commenced the study of the law with David Everett. Mr. Everett was a scholar and writer. He wrote Phi-Beta poems, dramas, essays political and literary; and on the fulfilment of the Prophecies, in which he assumes to prove, that the United States were distinctly alluded to by Daniel and St. John; and, more than all, he wrote the well-known poem, —

> "You'd scarce expect one of my age
> To speak in public on the stage."

Mr. Everett removed from Boston to Amherst, N.H.; and his student, Mr. Shaw, went with him, and there completed his term of study. Mr. Everett, who had been at the bar but two or three years when Lemuel entered his office, seems to have devoted himself to the study of almost every thing but the law. He soon after left the profession for more congenial pursuits, though, we believe, not more successful.

With what diligence Mr. Shaw pursued his studies under Mr. Everett, we cannot affirm; but, either then or at a later

period, he must have studied the law as a science, carefully and thoroughly. He had that familiarity with and wide comprehension of the principles of the law, and that facility and ease in their application, which come from patient and systematic study, and are seldom or never the result of practice only, studying for the case, cramming for the emergency.

Mr. Shaw was admitted to the bar of New Hampshire in September, 1804, and, in the following October, at a term of the Supreme Court at Plymouth, as an attorney in this Commonwealth. So great have been the legal products of New Hampshire, and her contributions to the bar of Massachusetts (Webster, Mason, Fletcher, Parker), and so large our debt, that we cannot afford to give her any credit for Lemuel Shaw. He was but a pilgrim and sojourner in that cradle-land of great lawyers.

The cases decided at the October term of Plymouth and Barnstable, 1804, are found in the first volume of the Massachusetts Reports. So that the professional life of Mr. Shaw begins with the system by which consistency, harmony, and symmetry were to be given to the then shapeless mass of our common law, — a work to which his labors were so largely to contribute.

Mr. Shaw settled in Boston. He had an office in the old State House with Thomas O. Selfridge. Whether there was a partnership, we do not understand. He testified at the trial, that he had an office with him. And that was his expression to the writer. After his trial and acquittal, Mr. Selfridge removed to New York, and the connection, if there was any, was dissolved.

Mr. Shaw did not find his way readily to large practice, or rise rapidly to distinction. But this was very far from being a misfortune. An early plunge into business would have made him a ready man; but time and opportunity for study, wisely improved, made him a full one. The qualities that readily attract business do not always secure and retain it.

If Mr. Shaw's progress was slow, every step was on solid ground. There was no slumping, no falling back. This was the secret of his success: if he had work to do, he did it as well and thoroughly as he could, and thus prepared himself to do the next better.

The first case in which his name appears in the reports is *Young* v. *Adams*, 6 Mass. 162 (1810). The amount involved was five dollars. The case was this: A note was payable in foreign bills. The promisor paid it, and the note was given up; but one of the bills given in payment was a counterfeit bill. The payee brought his action for the amount of the counterfeit note. Mr. Shaw put his defence on two grounds; first, that an action for money had and received would not lie; and, secondly,— the ground on which he principally relied,— that where there was no fraud and no express undertaking, and both the parties were equally innocent, *no* action would lie. The court, by Mr. Justice Sewall, said, "the two questions had been fully and ingeniously argued" by defendant's counsel, and, we hardly need to add, decided for the plaintiff. This was a small beginning; but perhaps the future Chief-Justice recalled the encouraging lines of Master Everett,—

> "Large streams from little fountains flow;
> Tall oaks from little acorns grow."

Mr. Shaw gave himself faithfully to the study and work of his profession, but not to the entire exclusion of other studies. A man cannot be a great lawyer who is nothing else. Exclusive devotion to the study and practice of the law tends to acumen rather than breadth, to subtlety rather than strength. The air is thin among the apices of the law, as on the granite needles of the Alps. Men must find refreshment and strength in the quiet valleys at their feet. For the comprehensive grasp of principles, for the faculty of applying and illustrating them; for the power to reach just conclusions, and to lead other minds to them, breadth of culture is necessary. Some other things are to be studied beside the reports and text-books.

The Law is not "a jealous mistress;" she is a very sensible mistress. She expects you to keep regular hours; but an evening with the Muses or the Graces does not awake her ire. The mind requires not only diversity of discipline, but generosity of diet. It cannot grow to full, well-rounded proportions on any one aliment. Mr. Shaw understood this, and read and studied and observed much outside of Coke and Blackstone.

He did not, we think, keep up his intimacy with the Greek and Latin. He could not have written a Greek dialogue as well at fifty as at nineteen. But he was at home with the English classics, and a master of the English tongue. He liked the elder English novelists and satirists, — Swift, De Foe, Fielding, and Smollett.

He was a student and admirer of Hogarth, and used to call our attention to minute details of his pictures, showing the artist's nice touch and the student's careful eye.

He was a close observer of nature, — of the trees of the forest, and of the wild flowers and their haunts. He had a strong taste and love of mechanics and of the mechanic arts. A new machine was a delight to him, and after court he must go down to the machine shop or manufactory to see it in operation.

He took great interest in the affairs of the town, the then town of Boston; was fire warden, school committee-man, Fourth of July orator, and, for several years, one of the selectmen.

He had a strong interest in the affairs of the State; was for eight years a Representative from the town of Boston in the General Court; and for three or four years Senator from Suffolk.

He was an ardent Federalist, and a firm supporter of the Federal policy, State and National, from the beginning of the century to the dissolution of the party; and, what is to his credit, he never apologized for it, in public or private.

But he had too catholic a spirit for a mere partisan. He was a working member of the Legislature, giving his time to the service of the Commonwealth in useful and practical legislation. We know of no training and experience for the young lawyer better than two or three winters in a State Legislature; provided he goes there to study and to work, and not merely to dabble in party politics or make "hifalutin" speeches.

Of the practical and useful character of Mr. Shaw's work one or two illustrations may be given. While a member of the Senate, he was chairman of the joint committee to whom was referred the petition for a city charter for the town of Boston. He drew up the charter and plan of city government. This was then a new work, and required not only familiarity with the working of our town governments, but foresight and constructive skill. The work was well done, and eminently successful in practical operation. Mr. Shaw always took a deep interest in the working of the new system of government, and in the general progress and welfare of the city.*

While a member of the House, he was appointed one of the commissioners to publish a new and revised edition of the General Laws of the Commonwealth. His associate in the commission was Professor Asahel Stearns, of Cambridge. How thoroughly well and faithfully this work was done, the older members of the profession have reason to gratefully recollect. This edition was in exclusive use from 1820 to the general revision of the Statutes in 1836, and is still indispensable for reference.

These details may, we fear, be uninteresting; but the labors of Mr. Shaw as School Committee-man, Selectman, Rep-

* He was, in a sense, *conditor urbis*. His large services to the city and to the Commonwealth, of which the city is the head, fairly claim some memorial of her respect and gratitude. Would it not be a graceful thing for the city to place a duplicate of Hunt's great picture of the Chief-Justice in Faneuil Hall?

resentative, Senator, in editing the statutes and framing the city charter, make up part of the discipline, training, and experience of the great magistrate. He obviously is not the great judge who has studied law only as a science and in the books, but who has also seen and felt how it works in the every-day business of life. The province of the judge is to find and apply to the varied exigencies of life and business, not an abstract, but the practical, working rule. The skill and discretion and tact requisite to do this well, are the fruit of business training got either upon the bench or before one gets there. Hence it is that some labor at *nisi prius*, — the putting the rules of law into harness, and seeing just how they draw, seems to be indispensable, not merely to the making, but to the preservation, of a good judge. A court without experience in trials, gets to be practically, as well as technically, a court of *errors*.

In the Convention of 1820, to revise the Constitution of the Commonwealth, Mr. Shaw was a delegate from the town of Boston.

The separation of the District of Maine from Massachusetts, and its admission into the Union as an independent State, seemed to render such revision necessary. The Convention was unquestionably the ablest body of men that ever assembled in the State. It was in constant session some eight weeks. The old Constitution had been adopted in the midst of the Revolution, and had been in operation for forty years. It is marvellous to see how slight the changes that were made: so wisely and firmly had the men of 1780 builded, that little modification or repair of their structure was required. It reflects the highest honor upon the men of 1780, that their work needed so little change; and upon the men of 1820, that they had the sense to see it, and to let well alone. Some tolerably sensible men think, that most of the changes since adopted tend to show the wise forbearance of the Convention of 1820.

The fact is, that even the Convention of 1780 had but few structural changes to make, when the Province of Massachusetts Bay became an independent Commonwealth. There was the agony of birth and separation; but the child was fully grown. States *do grow;* they are not *built up* with hammer and trowel, much less with "the stuff that dreams are made of."

Mr. Shaw took a less active part in the labors and debates of the Convention than we should have anticipated from his fitness for such work. When he addressed the Convention, it was upon practical subjects, — briefly, forcibly, and to the point. He spoke against a proposed amendment to make the stockholders of banks personally liable; in favor of the amendment giving authority to the Legislature to establish city governments; in favor of an amendment requiring a vote of two-thirds of each branch of the Legislature to remove a judge from office by address; against an amendment of the Bill of Rights, which should give to a prisoner a right to be heard both by himself and counsel, — a right, by the way, which has always been practically enjoyed by prisoners in this State, and which we have never known our courts to question.

It was while Mr. Shaw was a member of the House of Representatives of 1820–21, that the impeachment and trial of Judge Prescott took place. An admirable report of this trial was made by two then young but accomplished members of the bar. The trial, before the Senate of the Commonwealth, excited great attention, and was conducted with eminent ability on both sides. Judge Prescott was defended by an array of talent seldom enlisted in any cause, — Webster, Prescott, Blake, Hoar, and Hubbard. The House had many eminent lawyers among its members, and King, Lincoln, Baylies, Dutton, Fay, Shaw, and Leland were elected managers. The judge was impeached for maladministration in his office of Judge of Probate, by the taking of illegal fees.

Mr. Shaw was engaged throughout the trial, and argued the cause for the prosecution, in immediate reply to Mr. Webster's argument for the defence. The argument of Mr. Webster is among his collected works, and is familiar to the profession and to general readers. Mr. Webster had conducted the defence with great vigor, but defiantly, and with less discretion than marked his later efforts. The close of Mr. Webster's address has been often cited and recited, as a happy specimen of his eloquence. It made an impression upon the Senate: it would have made a deeper one upon a jury. We think the argument of Mr. Shaw may be read immediately after that of Mr. Webster, without feeling that there is any descent. It has not the rhetoric of Mr. Webster, — eloquence, if that is the better word; but it is robust, manly sense, in clear, vigorous English. Its tone and temper are judicial, as became the speaker's position. As this is, we believe, the only well-reported argument of Mr. Shaw while at the bar, we are tempted to cite a short passage at the opening, and a few sentences at the close, to show his style and manner:—

"Mr. PRESIDENT, — In common with the honorable managers with whom I am associated, I trust that I am sufficiently impressed with the magnitude and importance of the transaction in which we are now engaged. I am well aware of the dignity of the high tribunal before which I stand; of the duty of the constitutional accusers by whom this prosecution is instituted; of the elevated personal and official character of the accused; of the nature of the offences imputed to him; and the deep and intense interest which is felt by the community in the result of this trial. It is perhaps true, that these transactions may be recorded and remembered; that the principles advanced, and the decisions made, in the course of this trial, will continue to exert an influence on society, either salutary or pernicious, long after all those of us who, either as judges or as actors, have a share in these proceedings shall be slumbering with our fathers. And yet I do not know that these considerations, serious and affecting as they certainly are, can afford any precise or practical rule, either for the conduct or

decision of this cause. In questions of policy and expediency, there is a latitude of choice; and the same end may be pursued by different means. But in the administration of justice, in questions of judicial controversy, there can be but one right rule. Whether, therefore, the parties are high or low; whether the subject in controversy be of great or of little importance, — the same principles of law, the same rules of evidence, the same regard to rigid and exact justice, must guide and govern the decision. 'Thou shalt do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honor the person of the mighty; but in righteousness shalt thou judge thy neighbor,' — is an injunction delivered upon the highest authority, and enforced by the most solemn of all sanctions.

"Nor am I aware that powerful and animated appeals to your compassion or resentment can have any considerable or lasting influence. They may, indeed, afford opportunity for the display of genius and eloquence, excite a momentary feeling of sympathy and admiration, and awake and command attention. Beyond this, their influence would be pernicious and deplorable. If the charges brought against the respondent are satisfactorily proved, justice — that justice due to the violated rights of an injured community; that justice deserved by the breach of the most sacred obligations — demands a conviction, from which no considerations of compassion can or ought to shield him. On the contrary, if these charges are not substantiated, or do not import criminality, no feelings of resentment, no prepossessions of guilt, however thoroughly impressed, can prevent his acquittal."

Mr. Shaw thus closed his address: —

"Notwithstanding the length to which these remarks have extended, I am sensible that I have taken but an imperfect view of the details of this long and complicated case. But I address myself to experienced men, to intelligent judges, capable of estimating the qualities of conduct, and appreciating the force of evidence. We have no earnest invocation to make to the Judges of this honorable court, except that they will examine the case, now submitted to them, without fear, favor, affection, prejudice, or partiality; and pronounce their decision, not according to the momentary impulses of sympathy and compassion, but upon the invariable dictates of judgment and reason. If sensibility should usurp the seat of justice, and take the place of the understanding and judgment, laws would be unavailing, and all civil and social rights become fluctuating and uncertain. Justice might throw away

her balance, for it would be useless; and her sword, for it would be mischievous. If punishment and disgrace are to overtake the respondent, it is because punishment and disgrace are the natural, the necessary, and the inevitable consequences of turpitude and crime. The representatives of the people of this Commonwealth demand at your hands no sacrifice of innocence: they ask for no victim to their resentment; for they have none to gratify. If, applying the evidence to the law in this case, this court can, consistently with the conclusions of enlightened and inflexible judgment, pronounce the respondent innocent, these representatives will rejoice to find, that the reputation of this Commonwealth still remains pure and unspotted. But if their conclusions should be otherwise; if this court is satisfied that the respondent has abused the powers entrusted to him, disregarded the rights of others, and violated his high official duties, — the representatives of the people do earnestly hope, and confidently trust, that this high court, disregarding all consequences personal to the respondent, will pronounce such judgment on his conduct as will prove a salutary example to all others in authority, vindicate the honor and secure the rights of this Commonwealth, and enable them to transmit to posterity that unblemished reputation for purity, honesty, and integrity, in the administration of justice, which has hitherto been the ornament and glory of Massachusetts."

Mr. Shaw was in practice twenty-six years. He occasionally went into the other counties, but his business was chiefly confined to the Boston courts. He worked alone, with brief exception, for the first sixteen years, and then took into partnership Mr. Sydney Bartlett, who had been his student, and who is now so well known to the bar of the Commonwealth and in the Supreme Court at Washington.

Mr. Shaw travelled but little, was fond of home, but enjoyed greatly the meetings of the clubs of which he was a member, and other social gatherings. Pleasure was given as well as received. He had fine social qualities, large conversational powers and a fund of humor and quiet mirth.

He was twice married. His first marriage, at the somewhat mature age of thirty-seven, was with Eliza, a daughter of Josiah Knapp, Esq., a merchant of Boston. By her he

had two children, — a son and daughter. His second marriage was in 1827, with Hope, a daughter of Dr. Samuel Savage, of Barnstable, by whom he had two sons, Lemuel and Samuel, both members of the bar in Boston. Home was always a happy place to him; and he never was more attractive and delightful than at his own fireside.

Though he kept up his interest in public affairs, and was willing to go to the Legislature, he refused to go to Congress.

He wrote occasionally for the press, but on legal or constitutional questions. The article, for example, in the "North-American Review" for January, 1820, on "Slavery and the Missouri Question," which attracted much attention at the time, was from his pen. It is an able exposition of the malign character and the effects of slavery, social and political; resists its further progress; insists upon making, as a condition of the admission of Missouri, the provision, that slavery shall for ever be prohibited within it; and argues at length and with great ability, — we do not say conclusively, — that such a condition would have the force of compact, from which the State, after its admission, could not absolve itself. The convictions then expressed, as to the influence of slavery, social, economical, and political, and the duty of the North to oppose and resist its extension, were, we have reason to believe, never modified.

He also wrote an article in the "American Jurist" of January, 1829, in which he criticises and shows the unsoundness of the doctrine (a nod of Homer) stated by Chief-Justice Parsons, in *Storer* v. *Freeman*, 6 Mass. 438, that the colony laws and ordinances were annulled with the annulling of the charter under the authority of which they were made.

In this quarter of a century at the bar, Mr. Shaw built up a solid professional reputation, and acquired a valuable practice; not a great many cases, but important and leading causes, like *Charles-River Bridge* v. *Warren Bridge*, 7 Pick. 144, and *Blake* v. *Williams*, 6 Pick. 286, requiring hard

work and tough conflict. His examinations and arguments of legal questions were comprehensive and thorough, not neglecting the precedents, but getting down always to the principles which underlie them. His addresses to the jury (we speak from reputation) were forcible, earnest, logical; not brief; with little rhetoric, but that good in quality.

Upon the death of Chief-Justice Parker, in the summer of 1830, Mr. Shaw was appointed by Governor Lincoln his successor. The selection proved so wise and judicious, and reflected so much honor upon the Commonwealth, that one and another excellent gentleman has convinced himself, that it was by his suggestion, and through his influence, that the appointment was made. But no man better understood the wants of the place than Governor Lincoln, or who was able to fill it. He had practised under the great Chief-Justices, Parsons, Sewall, and Parker, and well understood that only a strong man could continue the line. He had been in both branches of the Legislature, in the Constitutional Convention, and on the bench of the Supreme Court, and knew all the leading members of the bar of the State. Mr. Shaw had been associated with him as counsel; had been with him in the Legislature, in the Convention; and had practised before him as judge. The idea that any person could find out some excellent lawyer, little known to the Executive, — who had been himself on the bench, — and get him appointed Chief-Justice of the Supreme Court, is simply absurd. The selection was made by Governor Lincoln, and is but one of many claims of this excellent magistrate to the respect and esteem of the Commonwealth.

It is true, however, that Mr. Shaw was unwilling at first to take the office; and a heavy pressure was brought to bear upon him before he consented to accept. He was then in the fiftieth year of his age, had won his way rather slowly, but surely, to eminent rank at the bar, and to a valuable business. He had acquired a moderate property, and was living happily

and to his taste. He had a growing family to support and educate. He knew a great place was to be filled, and was distrustful of himself. He felt that he ought to and must decline. In this exigency, Mr. Webster was requested by the Governor to confer with him, and urge his acceptance of the place.

Mr. Webster used to give a pleasant account of this conference. He found the future Chief-Justice smoking his evening cigar. Mr. Webster could not join him. It was a weakness of this otherwise notable man, that he could not smoke. So Mr. Webster talked while Mr. Shaw smoked. Mr. Webster made a regular onslaught upon him. Conceding the personal and pecuniary sacrifice, he pressed upon him, with the greater earnestness, the public want and demand, the dignity and importance of the office, and the opportunity it presented of winning an honored name, by valuable and enduring service to the State. Mr. Shaw was silent, showing, as Mr. Webster put it, the impression made upon him, only by the greater intensity with which he puffed. Mr. Webster could get no more at the first interview than the promise not to say No, before he saw him again. At a second interview, with the aid of Mr. Shaw's own reflections, and the urgency of leading members of the bar, and his own appeal, Mr. Webster got a reluctant assent. Mr. Webster used to add, that however the balance might be as to his other public services, he was sure the Commonwealth owed him a great debt for that labor of love; that his efforts (so he thought) had secured for the State, for twenty years, so able, upright, and excellent a Chief-Justice. It is not difficult to believe, that the earnest counsel and pressure of Mr. Webster, fresh from the field of the great debate in which he had shown himself the first of living orators, and for which the heart of New England so clave to him, should have had large, even decisive, influence upon the judgment and will of his friend. Be this as it may, it speaks none the less for the Chief-Justice, that the greatest of New-England statesmen should have felt it added

to his laurels, and to his claims upon the consideration of the people of Massachusetts, that he had aided in obtaining for her the services of such a magistrate.

Chief-Justice Shaw withdrew from the bench in the summer of 1860. Upon his retirement, an address was presented by the bar of the State, expressing profound admiration of his judicial labors, and personal esteem and veneration. He died on the 30th of March, 1861, in the eighty-first year of his age. His death was the tranquil close of a green and happy old age, the sunset, without a cloud, of a long, bright, and well-spent day, useful and vigorous even unto the twelfth hour. His death occurred just at the outbreak of the great rebellion. Though the bar and the courts united in tributes of respect and veneration to his memory, and arrangements were made for the delivery of an eulogy at a future day, the person selected for the duty having been for some time withdrawn into the public service, and the profession, as well as the public generally, absorbed in the interests, duties, and passions of the great conflict, the service was never performed. The writer hopes this imperfect sketch may be some atonement for that failure.

It remains for us to give some estimate of his judicial life and labors. In this estimate we cannot omit the element of time. He went upon the bench in his fiftieth year, and then worked, through the lifetime of a generation, with strength and vigor to the last. Some of his later judgments are, indeed, his best; are remarkable for their freshness, for the sagacity and grasp with which he apprehended the new exigencies of society and business, and applied and adapted the old rules of law to them. A striking and beautiful illustration may be found in the case of the *Commonwealth* v. *Temple*, 14 Gray, 69. This opinion contains a thorough consideration of the rights of travellers to the use of the highways, as affected and modified by the introduction and use of street railways.

It was written when the Chief-Justice was in the eightieth year of his age. Old men sometimes travel well in beaten paths; but this opinion strikes out new paths, and has the freshness, vigor, and constructive power of early manhood. We never read it without admiration of the good sense, tact, and grace even, with which the principles of the common law are moulded to new conditions, and the old fitted to the new, without seam. Lawyers in distant cities of the country, where street railroads were introduced, felt it to be fortunate that it should have fallen to the lot of Chief-Justice Shaw to lay open this new path.

We have to consider, also, how broad and varied was the field of his labor; that the work which, in Westminster Hall, would be apportioned among at least a half-dozen different courts, is with us united in one. Saving the jurisdiction in admiralty, his domain was the whole field of jurisprudence. To-day he would be sitting in a court of equity; to-morrow, in a court of errors; the next day, trying a capital indictment; the next, the probate of a will; then a question of marriage or divorce, then an appeal in bankruptcy, — for the insolvent law of Massachusetts was in substance and effect a bankrupt law. Add to these the new domain of constitutional law, growing out of our written frames of government, State and national, and the limitations which they were intended to impose upon legislative, judicial, and executive authority, in the State or nation; the supervision of all courts of inferior jurisdiction, as well as for many purposes of municipal corporations, and you get some idea of the extent and variety of the labors of the court over which he presided. When we think of these, we marvel not that mistakes are sometimes made, but that they are not more frequently made; and that the decisions of a court having so boundless a field to cultivate and reap, should, for more than sixty years, compare so well with those of courts whose jurisdiction and labors are limited to a single province of jurisprudence. The fact is, that the breadth and

comprehensiveness of the field give breadth of comprehension to the laborers; and cases are argued and settled less upon mere precedent and more upon principle, than in courts of more limited jurisdiction. If there is less accuracy of learning, there is less sticking in the bark, — more room for expansion and growth.

We may not omit to consider, in any estimate of the labors and services of the Chief-Justice for thirty years, the great changes which have taken place in the methods and instrumentalities of commerce and business, and what new applications and modifications of the principles of the common law became necessary to meet the new exigencies.

It is a mistaken notion, that, while every thing moves forward, the law can remain stationary, or lag far behind. In no department of science, art, or business, have change and progress been more marked, for the last thirty years, than in our jurisprudence. In the nature of things, this could not be otherwise. Whenever a new invention or discovery is made, a new application of science to the arts and business of life, the law must follow closely in its footsteps, to secure its results, or to secure society against them. The first puff of the engine on the iron road announced a revolution in the law of bailments and of common carriers. The use of the railroad for the carriage of passengers and freight has indeed created a new branch of law, made up to some extent of statute provisions, but to a far greater extent by the application and adaptation of the rules of the common law to the new condition of things. The railroad began to be used as Judge Shaw came upon the bench. How much his wisdom, foresight, and that clear comprehension of the principles of the common law which enabled him to separate the rule from its old embodiments, and to mould it to new exigencies, contributed to build up this law, to give it system and harmony, and a substratum of solid sense, is well known to the profession. We refer to a single case, — that of the *Norway-Plains Co.* v. *Boston &*

Maine Railroad, 1 Gray, 263, as an illustration and confirmation of our remark.

In the thirty years which Mr. Shaw presided in the Supreme Court, great changes were made in the jurisprudence of the State and the methods of administration; and he was constantly called upon to adapt himself to these changes, to reconcile the old with the new, and to assist in bringing them into order and harmony. As in the changes wrought in the law by new applications of science to intercommunication, he showed here also the strength and fertility of his resources, wherever principles and their application were involved.

We can but glance at some few of the changes in the law and its administration.

In the methods of administration, the most important change was the extension of the equity jurisdiction and powers of the Supreme Court. When the Chief-Justice came upon the bench, the equity powers of the court were limited to a few clearly defined subjects-matter, and the equity business and practice were small. Before he left the bench, its chancery jurisdiction covered the whole domain of equity, and was fast acquiring the qualities of Aaron's rod.

In the common-law courts, a new system of pleading, except as to real actions, has been introduced; as compared with the old system of special pleading, illogical and slipshod, without form or comeliness; but, after all, answering the ends of substantial justice better than the often over-nice and subtle logic of the old system. With all the imperfections of the new practice, the merits of the cause sooner or later struggle into light. It was not always so with the old.

There have been also radical changes in the law of evidence. The objections to the competency of witnesses, with the discussions of which the reports were crowded thirty years ago, as parties to the record, for interest direct or contingent in the suit, from want of religious belief, by reason of conviction for crime, even from the relation of husband and

wife, have been swept away, and, going only to the weight of the testimony, are transferred from the bench to the jury-box.

Another material change is the abolition of imprisonment for debt, and of what was justly called the old grab-law, under which the maxim, "*Vigilantibus non dormientibus subveniunt leges*," was translated "The devil take the hindmost;" and the substitution for them of one of the best systems of insolvency and bankruptcy known to jurisprudence.

Most material also have been the changes in the law of the domestic relations, and especially that of husband and wife; by the most important of which the wife owns and controls the property coming to her by gift, descent, or as the fruit of her own labor, — a gift of power likely to lead to more radical results. Add to these, changes in the law of divorce, by which new causes for the dissolution of the marriage bond have been allowed, and the facility of separation greatly increased.

Nor would we omit, in any sketch of our legal progress, to note the changes in the modes of trying causes at *nisi prius* and in the arguments of questions of law *in banc*. The manners of counsel have much less of asperity, and there is much less of personal controversy and identification of counsel with the passions and prejudices of their clients, than prevailed thirty years ago.

The rules requiring written or printed briefs, and limiting the time for the argument of questions of law, and the limitation of the time for addressing the jury, have compelled counsel to greater directness and condensation of argument. This last change may have been wrought somewhat at the expense of the eloquence of the bar. But this is not matter of serious regret. The court-room is a place for serious business, and not for rhetoric; and any eloquence that does not arise from a direct, logical, earnest, condensed presentation of the cause, may well be left for the platform and the stump.

We have alluded to these changes in the law of Massachusetts and its practice, not to discuss them, — we are indeed of opinion, that they have been wise and salutary, — but for the purpose of indicating what constant vigilance, activity, and fresh power were necessary to the discharge of the duties of the Chief-Justiceship for the period Mr. Shaw held the office. No mere following of the old ruts would answer. New paths had to be opened and fitted for travel, new hills of difficulty had to be cut through, new chasms bridged, new causeways over bog and morass constructed. In the comprehension of principles, new or old, and their adjustment and reconciliation, he was wise and strong. We do not think he took so kindly and readily to new forms of procedure; that he ever, for example, felt himself at home under the new Practice Act.

We must try to give a somewhat nearer view of the Chief-Justice on the bench. He was a good *nisi prius* judge. His perceptions were not remarkably rapid. He was not anxious to anticipate counsel, and see how summarily he could twist the neck of a cause. He was careful, thorough, systematic. He had a patient ear, — not merely the passive consent to listen, but the desire to be instructed in the facts and law of the case, no matter how inconsiderable the amount involved, or humble the parties or their counsel. He was no respecter of persons; and a good point, well put by the youngest member of the bar, told with the same effect as if by the leader. His rulings upon interlocutory questions and the admission of evidence were well considered and carefully noted. His charges to the jury were simple and clear; in difficult and complicated questions of law and fact, remarkably lucid, comprehensive, and forcible in matter and impressive in manner. He had a remarkable power of so stating and illustrating the principles of law applicable to the cause as to reach the minds of the jury. He was, in the best sense, impartial, and weighed with an even scale the merits of the cause. But he did not understand, that, to be impartial, he must have equal respect

for truth and falsehood, or for a sound proposition and a fallacious one; or that the important points must not be stated with sufficient distinctness and force to be fully understood.

It was a pleasure to try causes before him, if it ever is a pleasure to try causes: for your repose in his integrity, fairness, and sense of justice was never ruffled. He held the reins in his own hands, quietly, firmly, with no twitching or jerking, but so that the strongest men at the bar perfectly understood who presided.

The Chief-Justice brought to the hearing *in banc* the same patience, the same desire to be instructed. There never was a judge who more thoroughly understood and appreciated the importance of an able, upright, and learned bar in the administration of justice. He was very unwilling to decide any difficult cause that had not been thoroughly argued. He seemed to feel himself unqualified to decide it. He was reluctant even to depend upon briefs or written argument. He liked far better the thorough oral discussion by counsel, with an occasional probing and feeling, on his own part, for the roots of the matters in controversy.

In his anxiety to do right, and his desire for the most thorough investigation and consideration of causes, the decision was sometimes deferred, after all the questions had been thoroughly and exhaustively discussed and considered, and when further delay might work injustice. Delay in judicial proceedings is not indeed an unmixed evil. Some delay between the inception of a cause and the trial is good for the parties and the public. Many a bitter controversy has been spared, and the peace of many a family and neighborhood saved, by giving time for the passions of parties to cool and to pass in review before the judgment. And, when a cause has been tried, there is nothing that is so soothing to the failing party as the conviction, that he has been patiently heard, and his cause patiently and thoroughly considered. It is difficult to find the golden mean; but sometimes the delays

of the Chief-Justice, to those who did not understand the motive, looked like procrastination. If it was a failing, it leaned to virtue's side.

Chief-Justice Shaw had the highest sense of natural justice and equity; but he had also the profoundest sense of the necessity of uniform and stable laws. He saw in the law the rule of conduct for the judge as well as the parties; and that it was the province of the good judge, as Lord Bacon says, *jus dicere*, not *jus dare*. He did not believe that it was any part of his duty to bend a positive rule of law to any fancied or even real equity of the case. He appreciated the wisdom and safety of positive rules and restrictions, like those of the Statute of Frauds and the Statute of Limitations; knowing they must sometimes work injustice, but were necessary safeguards against far greater wrongs, and, in the long-run, wholesome and salutary. The subtleties and sentimentalities by which Chancellors have frittered away the Statute of Frauds, — or, as Mr. Justice Story would say, "rescued cases from its grasp," — did not commend themselves to his judgment. He thought it better to say, This is the rule the law-maker has prescribed.

He was a man of great firmness. It was not obstinacy, dogged conceit, unwillingness to confess error. He was singularly free from these. We never knew so great a man who had so little pride of opinion. His firmness was sense of duty; nothing could shake or disturb that. Such was the veneration for him, that no man would have ventured to suggest to him a consideration or motive outside of the line of duty. Though this firmness brought him into conflict with a strong and sensitive popular opinion on several occasions, we think it never impaired the public esteem and confidence. Men who knew Chief-Justice Shaw found it impossible not to respect him. The weight of his judicial character, the unusual confidence reposed in him, were among the effective practical arguments with the people against a change in the

tenure of the judicial office in 1853. A gentleman of our acquaintance, meeting a distinguished member of the Constitutional Convention held that year, inquired, "What are they doing at the State-House?" The reply was, "Discussing the question, whether Chief-Justice Shaw is a divine institution or a human contrivance." A fear was entertained that any change in the tenure of the office would result in his resignation. He was not a man to be content with any loss of the stability or dignity or rights of his court. When the salaries of the Judges of the Supreme Court were reduced by the Legislature in 1843, he refused to draw his salary. In 1844, the act reducing the salaries was repealed, and compensation made for the difference.

It was the habit, while Chief-Justice Shaw was on the bench, for the court, on the last day of the law term, or in long terms on Monday mornings, to deliver oral judgments in the cases already decided. Sometimes the reports of the opinions orally given sufficed. More frequently they were subsequently written out for the reporter. These were field-days for the Chief-Justice. He was never so great, and never felt to be so great, as in some of these oral judgments. His mind always seemed to be a little cramped by the pen. His oral style was not only more free, it was, to our apprehension, more finished and perfect than his written. He had less to do with cases. Having made himself master of the facts and the precise points in contest, he applied to their solution the law, with such ease and clearness, that his law did not seem to you a thing acquired, but part of the mind itself. Upon reading the judgments afterwards written out for the books, you felt a disappointment: a certain glow and finish were wanting. You could not help regretting, that the oral judgment could not have been preserved fresh and warm as it fell from his lips.

The judicial opinion for which he was most bitterly and severely reproached was that in the *Sims Case*, 7 Cush. 285.

There were portions of that opinion which did not command our assent. But it is not difficult to understand or to respect the position of the Chief-Justice on the subject. In conviction and feeling, he was firmly opposed to slavery and to its extension. His article in the "North-American Review" of 1820, shows the strength of these convictions. His opinions in *Commonwealth* v. *Ares*, 18 Pick. 193; *Commonwealth* v. *Taylor*, 3 Met. 72; *Commonwealth* v. *Fitzgerald*, 7 Law Reporter, — show clearly, that, for the cause of natural right, he was ready to go up to the extremest line of positive law. The slave brought here by his master was free. The slave brought here by an officer of the navy, whose landing on our coast was involuntary, was free. He would not permit the voluntary return of a minor slave He felt that in the *Sims Case* the line of positive law was reached; that it was defined by authority he was bound to respect. His own conviction, the result of maturest consideration, was, that the law was authorized by the Constitution of the United States; and that Constitution he had solemnly sworn to support. On its face was written, "This Constitution, and the laws of the United States made in pursuance thereof, . . . shall be the supreme law of the land, and the judges in every State shall be bound thereby; any thing in the constitution and laws of any State to the contrary notwithstanding." The Chief-Justice was so simple, honest, upright, and straightforward, it never occurred to him there was any way around, over, under, or through the barriers of the Constitution, — that it is the only apology that can be made for him.

But, after all, the reputation of the Chief-Justice as a jurist must rest upon his reported judicial opinions. These, beginning with the latter part of the ninth volume of Pickering, extend to, and will include, the sixteenth volume of Gray. They make, perhaps, a third part of the matter in these fifty-seven volumes. Through these reports, he is well known to the profession in this country and in Westminster Hall; but

chiefly to the profession. Few men read the reports but lawyers. The bar constitutes the public of the bench. The bar only can fully appreciate the merits, or detect the shortcomings, of the judge. There is no escape from its judgment; and nothing but real merit secures its approbation. Pride of place, the air of gravity, parade of learning, spreading one's ideas thinly over a sheet of paper, solemn rhetoric, "wise saws and modern instances," avail nothing with good lawyers. They readily see whether the judge has got the matter in him, — such thorough comprehension of the principles of law, that they have ceased to be mere learning, and have become part of the mind's texture, — the analytic power which separates from the mass of immaterial matter the precise point at issue, and the trained judgment which applies to it the precise legal rule.

The judge is yet more severely tried and judged in the reports. There is time for more careful analysis and thorough weighing of every position taken; and, when an opinion blocks the way of strong counsel, the dissection is merciless. The Chief-Justice stood every test at the bar. No lawyer practising before him doubted whether there was a strong man on the bench. He will stand equally well in the reports. Take him for all in all, his is the first name in the judicial annals of Massachusetts. He had not, perhaps, the legal genius of Parsons or Jackson, but, it seems to the writer, larger grasp and wider scope.

His judicial opinions are thorough and exhaustive. They seldom rest on mere authority, but strike down to the hard-pan, — to the principle on which the cases rest. Considered as judgments merely, the range of discussion is sometimes too broad. The reader has to be cautious and careful to discern between what is necessarily involved in the decision, and what comes from the overflowing mind of the judge in the way of illustration and argument.

There was another quality of the mind of the Chief-Justice,

which always impressed us, — its forecast, a sort of prophetic forecast. It never said to itself, Settle this point, and "Sufficient unto the day is the evil thereof." His was "the wise discourse, which looks *before* and after." His mind was constantly reaching and feeling its way forward. His opinions show this habit of thought, and frequently contain intimations and suggestions which you find in subsequent cases have ripened into rules. A mind like this, it is obvious, would not be content simply to find a point upon which a case could be decided or turned off. It insisted upon grasping the principles involved, and wheeling the case into line.

We venture to affirm, that there are, in the reports of this country or of Westminster Hall, no more instructive and suggestive judicial arguments than those of Judge Shaw. When, in the course of professional investigation, we strike one of his leading opinions, there is a feeling of comfort, an assurance, that, if we do not find our point decided, we shall at least be refreshed and strengthened and directed for our farther journey. We know of no more valuable contributions to the illustration of the principles of the common law.

While the style of the Chief-Justice is vigorous, forcible, and copious, in illustration, — terseness and precision are sometimes wanting. Chief-Justice Shaw could not perhaps have written Vice-Chancellor Wigram's "Treatise on the Use of Extrinsic Evidence in the Interpretation of Wills," or the opinion of his own court in the case of *Brattle-square Church* v. *Grant;* in which the law assumes the beauty and precision of the exact sciences. But though there is here and there a little diffuseness in his style, sometimes repetition, the points are clearly and thoroughly stated, and vigorously enforced. He did not wind his way through the entanglement of glade and forest. He cut through a broad path, and let in the air and sunlight. It took time; but the way afterwards was open and clear, and its direction not to be mistaken.

It is, of course, impracticable to examine, within any rea-

sonable limits, even what may be called the leading opinions of the Chief-Justice. To be fairly judged, they must be carefully analyzed and studied. Examine almost any volume of the reports, and we may get some idea of the extent of the field in which he had to labor, of the thoroughness of his work, and of the largeness of his powers. We have before us the seventh volume of Cushing (1853). The volume contains at least three leading and most important causes, in which the opinion of the Court was given by the Chief-Justice, — *Commonwealth* v. *Alger*, *May* v. *Breed*, and the *Sims Case*. We shall very briefly refer to them.

Commonwealth v. *Alger* was an indictment for constructing and maintaining a wharf extending beyond the lines fixed by the statutes of the Commonwealth for Boston Harbor. The defendant (Alger) was, under the colony ordinance, the owner of the fee in the flats on which the wharf was built.

The acts of the Legislature fixing the lines of the harbor, and restraining the owners of the flats from building beyond those lines, had made no provision for compensation to the owners, on account of such restriction. The case was argued for the defendant with great ability and force, upon the ground, that the act in question was an exercise of the right of eminent domain, and the taking of private property for public use; and that, no compensation having been provided, the act, as against the defendant, was invalid, as contravening the Bill of Rights of Massachusetts, Art. 10, and the provision of the Constitution of the United States, forbidding a State to pass a law impairing the obligation of contracts.

The case opened two important questions, — the rights of owners of land bounding on the sea, to the flats over which the tide ebbs and flows; and, secondly, the power of the Legislature to regulate the use and enjoyment of these rights. The careful reading of this opinion can, we think, leave no doubt as to the profound learning of the Chief-Justice, his grasp of principles, or his great power of illustrating and applying them.

In *May* v. *Breed*, the Chief-Justice discusses the question, whether a discharge, under the English bankrupt law, of a debt due to a citizen of Massachusetts, but contracted in England and payable there, is a bar to an action on the debt in that State; and, holding that the law of the place where the contract is made and to be performed gives to it its character, measures its obligations, and settles when and how it shall be terminated and discharged, pronounces the judgment of the Court for the defendant.

Sims' Case, as before observed, is an elaborate discussion of the constitutionality of the Fugitive-Slave Law of 1850.

Though the Chief-Justice presided over a local tribunal, these cases indicate how comprehensive was its jurisdiction, and that no court where the common law is administered could be called upon to discuss and settle questions of greater magnitude and difficulty. There is no court on either side of the Atlantic upon which the opinions in *Commonwealth* v. *Alger* and *May* v. *Breed* would not have reflected new lustre and honor.

The manners of the Chief-Justice upon the bench were quiet, simple, dignified. There was, however, an occasional austerity and roughness, which, to those who did not know him, looked like acerbity of temper. It was not so. The Chief-Justice had a kind heart, which would not willingly give pain.

But the manner was a fault. The practice of the law has trials and vexations enough, without adding any that are unnecessary. The utmost courtesy and respect are required from the bar to the bench; and courtesy is a reciprocal virtue. The example, too, of so great a judge is dangerous, and may tempt others to the fault, without the great qualities that redeem it. It was a wise prayer of good Thomas Fuller, to be saved from the errors of good men.

If we might, for a moment, and for a closing word, forget the critic and speak as the friend, it would be to say, that,

great as was the judge, the man was greater than the magistrate, — Lemuel Shaw than the venerable Chief-Justice. A truer man, indeed, did not grace his generation. With a little roughness of exterior, he was like the nuggets of California, — through and through solid gold.

But the man bowed to the magistrate. With the largest sense of equity, he was the servant of the law he was set to administer, and obeyed its mandate. With the most generous love of freedom, and hatred of oppression, he stood unflinchingly by the Constitution he had sworn to support. With the soundest judgment, with masterly powers of reasoning, and, in discussion, with a subtlety of logic seldom equalled, he had literally no pride of opinion, but retained to the last the docility of childhood, — the ever-open and receptive and waiting spirit, into which wisdom loves to come and take up its abode. With a stern sense of justice, he had the tenderness of a woman; and while the magistrate pronounced the dread sentence of the law, the man was convulsed with grief and sympathy.

With a firm trust in God, with a constant sense of his presence, looking to him for guidance and support, nothing could move him from the path of duty. He stood in his place, and the waves of passion broke at his feet.

As man and as judge, he bore the severest test, the closest scrutiny. The nearer you got to him, the more thoroughly you knew him, — the greater, wiser, better man and magistrate he appeared to you. Great on the bench and in the books, it was in the consultation room or in conversation by his own fireside that you first understood and felt the variety and affluence and extent of his resources.

Mr. Justice Swayne.

Mr. Justice Swayne.

The sons of MR. JUSTICE SWAYNE have deemed it not improper to print what follows, for distribution to the members of the family and a few friends.

He was born in Frederick County, in the State of Virginia, on the 7th of December, 1804. His parents belonged to the religious society of Friends. The last two years of his educational course were devoted to the study of mathematics and the Latin and Greek languages at an academy in Alexandria. He fitted himself well for college. The failure of his guardian prevented him from having the benefit of a collegiate education. Robert E. Lee, at a later time the Confederate General, was also a pupil in the academy, and they spent many pleasant hours together. Mr. Swayne studied his profession at Warrenton, in his native State. Henry S. Foote, afterwards Governor of Mississippi and a member of the Senate of the United States, was a law-student there at the same time. An intimacy of the most affectionate character sprung up between the two young men and continued without abatement until the death of that very able and distinguished man about a year ago. In 1824, immediately upon his admission to the Bar, Mr. Swayne removed to Ohio. He had letters of introduction from

Mr. Clay and other eminent Western members of Congress. They were procured for him by a Virginia friend then in public life. One of the last persons of whom he took leave in Washington was President Monroe. It occurred at the close of a levee at the White House, the night before the young adventurer set out on his Western journey. The parties never met again. The journey was made all the way on horseback. Within a few days after his arrival in Ohio, the Hon. Charles R. Sherman, the father of General and Senator Sherman, then recently elected a Judge of the Supreme Court of the State, lent Mr. Swayne his law library, which the latter kept until after the Judge's death, which occurred a few years later, in the forty-first year of his age. He was unquestionably one of the most brilliant and able men that ever lived in the State, and he was universally beloved. His young friend regarded this untimely death as a loss largely personal to himself, and he felt it accordingly. Mr. Swayne was admitted to the Bar of Ohio after a year's residence, which the law of the State prescribed as a condition precedent. In 1829 he was elected to the Legislature of Ohio for the County of Coshocton by a vote nearly unanimous. In the following Spring, without his solicitation, President Jackson appointed him Attorney of the United States for the District of Ohio. At the same time he was offered, by both parties, a seat in Congress, without opposition. Preferring to devote his life to his profession, he accepted the former position, and at once removed to Columbus, the capital of the State. He held the office of District Attorney nine years, and resided at Columbus, and was steadily engaged in the practice of his profession until his appointment to the Bench of the Supreme Court of the United States.

During that time he held numerous public trusts. None of them were of a political character, and it is thought unnecessary to name them. He received while pursuing his profession the degree of Doctor of Laws from the colleges of Yale, Dartmouth, and Marietta, in Ohio. Among his numerous students was ex-Senator Allen G. Thurman. They have been warm personal friends ever since. Mr. Justice McLean had repeatedly expressed a desire that Mr. Swayne should be his successor. That eminent judge died suddenly in the Fall of 1861. Among those who were most zealous in urging Mr. Swayne's appointment were William Dennison, then Governor of the State, and known as "the War Governor of Ohio"; Thomas Ewing, before that time a Senator in Congress, Secretary of the Interior and Secretary of the Treasury, and long the acknowledged head of the Bar of the State; Henry Stanbery, afterwards Attorney-General of the State and of the United States; Allen G. Thurman, before mentioned; H. H. Hunter, who was elected a Judge of the Supreme Court of the State, but declined to accept the place—the Nestor of the Bar; and Thomas Corwin, a Representative in Congress, Governor of Ohio, United States Senator, Minister to Mexico, Secretary of the Treasury, and the peerless orator! These names are mentioned because it is deemed an honor to have been so supported by such men. They were all Ohio men. Others, not less distinguished, in other States, might also be named in the same connection. On the 25th of January, 1862, President Lincoln nominated Mr. Swayne to the Senate to fill the existing vacancy in the Supreme Court. The nomination was unanimously confirmed by the Senate on the same day.

[From the National Intelligencer of Washington, D. C., of January 27th, 1862.]

"We learn that the Senate, in executive session on Friday last, confirmed the nomination of Noah H. Swayne, Esq., of Ohio, as Associate Justice of the Supreme Court, to fill the vacancy created by the death of the late Judge McLean.

"It is a matter of congratulation that the honor thus conferred has fallen upon one who, we understand, is so well fitted to wear with dignity, and preserve without spot, the judicial ermine in the highest Court of the nation. To great legal learning and eminence in the walks of his profession, (from which, moreover, he has never been tempted by the lures of political ambition,) he adds, in the judgment of those who know him best, the qualities of mind which singularly fit him for the able and impartial dispensation of justice. If the National Judiciary may be congratulated on such an acquisition to the Bench of the Supreme Court, it is also a matter of satisfaction that the President, in his choice of a successor to Judge McLean, has been guided by such a becoming sense of official propriety."

The new judge immediately took his seat on the Bench of the Supreme Court, which was then in session.

He held his first term of the Circuit Court at Detroit, where there was a large accumulation of business by reason of the protracted indisposition of his friend and predecessor, Mr. Justice McLean. The term lasted several weeks.

[From the Detroit Advertiser and Tribune of July 19, 1862.]

"JUDGE SWAYNE AND THE DETROIT BAR.

"On Thursday afternoon, July 17, 1862, a meeting of the Detroit Bar was held in the Bar Library, at which the following resolutions were adopted:

"*Resolved*, That the members of the Bar of the city of Detroit have learned, with deep regret, the passage of the act of Congress removing the Judicial District of Michigan from its connection with the Districts of Ohio and Indiana, and transferring it to a Circuit embracing Illinois and Wisconsin. We much preferred our former position, in view of our geographical and business relations, and our connection with the Circuit of Judge Swayne.

"*Resolved*, That this last consideration is the occasion of profound and sincere regret. Although Judge Swayne has attended but a single Circuit Court in our District, he has established lasting claims to our respect and gratitude. Urbane and friendly in social intercourse, on the Bench he has shown himself the courteous but resolute and dignified asserter of decorum and propriety. Patient to hear, he has been prompt and learned in decision. As a lawyer of large experience and research, his character was well known to us. He has shown that he possesses what is a more rare endowment—the high judicial qualities of unvarying courtesy in listening to argument; of accurate legal discrimination and perfect impartiality; of deep learning, and of the power of eliciting and exhibiting the real distinctions and points of a case, and of cogently and lucidly explaining his reasons and conclusions.

"*Resolved*, That we tender to him the assurance of our profound respect and personal esteem for him as a man and a judge, and that we hope that the legislation of Congress will restore Michigan to the Circuit in which he presides.

"Charles I. Walker, John S. Newberry, and Alexander W. Buell, Esqs., were appointed a Committee to present the resolutions to Judge Swayne; and it was also agreed to hold a meeting of the Bar of the State, at some future time, to express a preference regarding who should be appointed Judge of this District."

On the 25th of January, 1881, at the end of nineteen years of service, having reached the seventy-seventh year of his age, Mr. Justice Swayne placed his resignation in the hands of President Hayes. It was accepted, and took effect on that day.

[From the Washington Law Reporter of February 2d, 1881.]

"MR. JUSTICE SWAYNE'S RETIREMENT.

"A meeting of the members of the Bar of the Supreme Court of the United States was held in the court-room, January 31st, to take action on the retirement of Mr. Justice Swayne. Hon. Samuel Shellabarger was elected chairman, and Mr. James H. McKenney, Clerk of the Court, secretary. A committee on resolutions, consisting of the following gentlemen: Mr. Philip Phillips, of Alabama; George W. Williams, Oregon; Richard T. Merrick, District of Columbia; Elliott F. Shepard, New York, and J. Hubley Ashton, Pennsylvania, was appointed by the chairman, and they, through Mr. Phillips, reported resolutions which were adopted.

"Subsequently ATTORNEY-GENERAL DEVENS, in the Supreme Court, said:

"*May it please Your Honors:*

"The Bar were aware last Monday, when Mr. Justice Swayne delivered the opinion, the preparation of which had been entrusted to him, that they were listening to his words for the last time in this place. His retirement, in advanced life, indeed, yet with his natural force unabated, is an event that they would not willingly pass without proper expression of the respect in which they hold his eminent public services, and of the honor and love which they bear to him personally.

"Nineteen years have passed since he became a justice of this Court. With one exception, the senior associate detained from us during this term by a protracted and distressing illness, all who originally sat with him are gone. While no 'cold gradations of decay' have given admonition of the necessity of repose, he has deemed it wiser to seek it. His judicial life includes a great historic, or perhaps I should say, two historic periods, one the supplement and consequent of the other. The novelty and importance of the questions that were at once pressed upon the attention of the Court by the civil war will be readily admitted when we remember that questions concerning all the rights of helligerents, of confiscation, prize, blockade, and non-intercourse were to be at once discussed. The vast expenditures required novel systems and modes of raising revenue, and the legislation by which it was sought to meet the exigency became here, of necessity, the subject of inquiry and interpretation.

"His last opinion considers fully the important subject of the income tax imposed by the United States, and defines clearly and authoritatively the meaning of 'direct taxation,' as the term is used in the Constitution. At the close of the war came the period of reconstruction. As pointed out by Mr. Justice Swayne himself, it was sixty-one years since there had been any amendment of the Constitution. All the earlier amendments had been prompted by the anxiety of the States lest their autonomy should be invaded by the Federal Government, but a time had arrived when it was clearly necessary that rights acquired and results determined by the civil war should be placed under the guardianship of the Federal Government, and this was done by three constitutional amendments.

"The great power possessed by this Court, that of declaring a law, which had the sanction of all the forms of legislation, void, because in violation of the Constitution, had been exercised before this era in but two instances, which are found in the cases of Marbury agt. Madison and Scott agt. Sandford. But there followed upon the amendments, and the consequent legislation, a large series of constitutional inquiries which are by no means concluded. In all these great judicial debates, the subjects of which I have so hastily sketched, Mr. Justice Swayne bore his full share. His ability, his learning, his acquirements, and his ready capacity

to inquire, his calm judgment, and his sound common sense, caused his influence to be everywhere felt in all their various stages. His opinions, which will be found in more than one-third of the volumes of the United States Reports, commencing with the first of Black and extending through the twelfth of Otto, some thirty-seven volumes, are the enduring monument of his honestly-earned fame as a jurist.

"Such a fame may appear to the casual observer less brilliant than that of the orators, the soldiers, and the statesmen who were his contemporaries when it was won, yet it is not less dear, nor less valuable in the eyes of every thoughtful lover of the institutions of this Republic.

"The singularly amiable disposition and cordial manner of Mr. Justice Swayne were irresistibly attractive to all who practiced before him. He had a patience which was proof against dullness, he would listen after he himself was satisfied, in order that counsel might feel they had been fully heard. I have not spoken of his anxiety to do always what was just and right. Happily I stand before a tribunal which has endured nearly an hundred years, upon no member of which was there ever the imputation that he did not mean to deal justly and to do the right, as it was given him to see the right. It was one of Mr. Justice Swayne's strongest characteristics.

"In the fine chapter of the Old Testament which describes the farewell of the aged Samuel to his people, ruler, priest, and judge though he was, he desires to know, before he parts with his power to Saul, if he has done wrong to any man, that he may then testify it. 'I am old and grey-headed,' says he, 'but behold here I am. Whose ox or whose ass have I taken? Whom have I defrauded? Whom have I oppressed? At whose hands have I received any bribes to blind mine eyes?' And the people answered: 'As God is our witness, there is no such man.' Sure am I that should the distinguished magistrate who retires from the Bench ask: 'Who is there that has stood before me to whom I have not striven to do equal and exact justice?' The answer would be like that of the Hebrew people to the Royal Judge of Israel: 'There is no such man.' The good wishes of all go with him in his honorable retirement, consoled by those literary studies which have long been his delight, and by the dearer comfort of friends and family. As he may look back to the life that is past without regret, so he may look forward with serenity and confidence.

"At a meeting of the Bar held this morning the resolutions which I read were unanimously passed.

"*Resolved*, That the members of the Bar have learned with deep regret, that, in the opinion of Mr. Justice Swayne, the time has arrived when he should retire from the labors and duties of the Bench, which he has so long adorned.

"*Resolved*, That at the conclusion of his long and honorable career, the Bar deem it alike their duty and their privilege to express their sentiments of sincere respect for Mr. Justice Swayne, which have been inspired by

the large capacity, the full and accurate learning, the patient and persistent investigation, the anxious desire to do justice, the genial and benevolent courtesy he has uniformly accorded to the members of the Bar, which have distinguished him throughout the long period of his service on the Bench of the Supreme Court.

"*Resolved*, That the Attorney-General be requested to present these resolutions to the Court, and ask that they be entered on its minutes and communicated to Mr. Justice Swayne.

"The CHIEF JUSTICE replied as follows:

"The resolutions of the Bar and your remarks, Mr. Attorney-General, are no more than is due to the occasion, and we take pleasure in directing that they be entered on our minutes. Judge Swayne took his seat here at the beginning of the late civil war, when the Chief Justice was considerably more than eighty years of age and four of the five associates were bordering on seventy. He came fresh from a large and successful practice at the Bar, and brought with him an unusual familiarity with adjudged cases, and settled habits of labor and research. As might he expected he soon became one of the most useful members of the Court, and took an active and leading part in all its work. During the nineteen years of his judicial life, both public and constitutional law have been presented to the Court in great variety of phases and each successive term brought its new cases and its consequent new questions. What part he bore in this important service and how well he bore it, is best shown in the pages of the thirty-seven volumes of our Reports, which have been filled since he came on the Bench. Being favored with uninterrupted good health and great capacity for endurance, he has rarely been absent from his seat here or in the consultation room when required, and never except from necessity. His record as a judge is consequently the record of the Court during his service, and in his voluntary retirement he can have the satisfaction of feeling that his judgments here and elsewhere have been, as he believed to be, right. If at times he differed from his associates, he could always give a reason for what he did. His courtesy of manner on and off the Bench will never be forgotten, and he carries with him as he leaves the Court the esteem of every one of his associates.

"It has been his good fortune to be not only a student of the law, but of general literature as well. He has always been a welcome guest wherever he has gone, and we hope he may live long to enjoy the reputation he has won, the society of his family and friends, and the pleasure of his books."

A copy of these proceedings, taken from the journal of the Supreme Court, and certified by the clerk, were transmitted to Mr. Justice Swayne, with a letter from all the remaining justices. That letter was as follows:

"WASHINGTON, *February* 24, 1881.

"DEAR BROTHER SWAYNE:

"Your retirement from the Bench at this time, when we are being deprived of the counsels of several other justices with whom we have had such long and pleasant association, is peculiarly trying to your brethren who remain.

"We not only heartily join in the expressions of respect and regret which are so well conceived in the address of the Attorney-General and Resolutions of the Bar, a copy of which accompanies this letter; but we desire to communicate to you our own personal sorrow at the severance of those pleasant and harmonious ties which have so long united us.

"We feel how greatly we shall miss the aid of your profound and various learning, ever ready at call, ever instructive and apposite to the discussion in hand; and shall equally miss the cheerful flow of your unfailing courtesy and spirits.

"Our earnest wish is, that you may long enjoy the happiness which justly comes to vigorous age adorned with the wealth and graces of literature, surrounded by the charms of appreciative companionship, and the object of devoted affection.

"Ever and sincerely, your friends,

(Signed) "M. R. WAITE.
"SAM. F. MILLER.
"STEPHEN J. FIELD.
"JOSEPH P. BRADLEY.
"WARD HUNT.
"JOHN M. HARLAN.
"W. B. WOODS.

"Hon. NOAH H. SWAYNE."

The sentiments of respect, esteem, and friendship thus expressed in the valedictory of his brethren are warmly reciprocated for each and all of them by Mr. Justice Swayne. His connection with the Court involved constant labor, but during all the time his health was perfect and he had no domestic sorrow. He will always regard it as the happiest period of his life.

A fuller biographical sketch may, perhaps, be prepared hereafter by another hand. The object of this brief publication is more to present the circumstances of his retirement from the Bench than for any other purpose.

Such is the close of a laborious, well-spent, and not undistinguished public life, and one always free from the excitement of politics.

This is not the proper occasion to speak of his recollections of the many able men whom it has been the good fortune of Mr. Swayne intimately to know.

May 1, 1881.